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Written statement* submitted by Center for International Environmental Law (CIEL), a non-governmental organization with special consultative status

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I. Introduction

This report is prepared in anticipation of the first meeting of the Open-ended Intergovernmental Working Group (OEIWG) established by the Human Rights Council to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.[1]

The human rights responsibilities of transnational corporations (TNCs) and other business enterprises, and how to uphold those responsibilities, continues to be a subject of significant debate in the international community. It is generally accepted under human rights law that States who are parties to multilateral human rights treaties have the obligation to protect human rights from threats that result from the conduct of other actors, such as TNCs, which operate within their territory. Rather than directly governing TNCs, who are not parties to such treaties, this approach places a burden on the host-State to effectively regulate TNCs and other business enterprises and provide redress for violations when they occur.

However, host-States may lack the institutional capacity and/or the political will to regulate or provide redress for human rights violations. In some cases host-States may even be complicit in human rights violations due to political interference, corruption, or pressure from powerful TNCs.[2] In other cases, international investment agreements (IIAs) may be in place which present obstacles to the State regulating TNCs effectively.[3] Absent a sufficient regulatory scheme or redress mechanism in the host-State where the TNC carries out operations, it is exceedingly difficult to hold corporate actors responsible for human rights violations when they occur.

Noting the short-comings in the implementation of the host-State obligation to protect, this paper analyzes the extraterritorial duty to protect of home-States. This analysis is useful to elucidating how an internationally binding instrument can secure the implementation of extraterritorial obligations (ETOs) by home-States.

This paper begins by establishing the context of the problem in the current international legal order with respect to human rights and TNCs and describes the task of the Open-ended Intergovernmental Working Group on the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights. Section Three provides a background on ETOs and an analysis of their current state of play in international law. Section Four presents an overview of the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights,4 and demonstrates how the Maastricht Principles may be used as the legal basis to articulate the scope and content of ETOs in an internationally binding instrument. Section Five addresses the implications of ETOs in respect to the activities of TNCs under international law and puts forth concrete recommendations. Section Six concludes.

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[1] H.R.C. Res. 26/9, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, U.N. Doc. A/HRC/26/L.22/Rev.1 (June 25, 2014).

[2] See Lillian Manzella & Nicholas Lusiani, Collective Report on Business and Human Rights: Submission to the 8th Session of the United Nations Human Rights Council 28-31 (ESCR-Net Corporate Accountability Working Group, June 2008), available at http://docs.escr-net.org/usr_doc/BHRCollectiveReport_ESCR-Net.pdf; See also John Ruggie, Interim Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, ¶ 27, U.N. Doc E/CN.4/2006/97 (Feb. 22, 2005) (describing the correlation between corrupt governance and corporate human rights abuses).

[3] See Collective Report on Business and Human Rights, supra note 2 at 32.

[4] Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 29 NETH. Q. HUMAN RIGHTS 578 (2011), [hereinafter Maastricht Principles] available at http://www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForHumanRights/MaastrichtETOPrinciples.htm.

II. Context

A. Toward a Treaty on Transnational Corporations and Human Rights

For many decades, the international community has strived to establish global standards with respect to business and human rights. In 1974, the U.N. Economic and Social Council established the Commission on Transnational Corporations to formulate an international corporate code of conduct for TNCs.[5] The Commission struggled for nearly two decades to fashion an agreeable set of standards, but was ultimately obliged to dismantle in the 1990s due to a failure to come to a consensus.[6]

A second attempt at creating normative standards for corporate human rights obligations was made by the U.N. Sub-commission on the Promotion and Protection of Human Rights in 2004 with the proposed 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.'[7] The Draft Norms proposed a framework which would place binding obligations on corporations directly, whereby States would have 'primary' human rights duties, and businesses would have 'secondary' human rights duties.[8] Businesses vehemently opposed the Draft Norms and the Commission on Human Rights eventually declined to adopt it.[9]

Instead, the Commission on Human Rights requested the U.N. Secretary General to appoint a Special Representative with the goal of clarifying the roles and responsibilities of States, businesses, and other social actors under international human rights law.[10] In 2005, the U.N. Secretary General appointed a Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG).[11] In 2008 the SRSG proposed the 'Protect, Respect, and Remedy Framework.'[12] This Framework includes (1) the state duty to protect against human rights abuses by third parties, including business, through policy, regulation, and adjudication; (2) the corporate responsibility to respect human rights, which means the responsibility to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and (3) greater access by victims to effective remedy, both judicial and non-judicial.[13] This Framework was accepted by the Human Rights Council and was followed by a second mandate in 2008 to operationalize and promote it.[14] The U.N. Guiding Principles on

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[5] See E.S.C. Res. 1913 (LVII) (Dec. 5, 1974).

[6] For further discussion on the history of the United Nations' early work in business and human rights, see TAGI SAGAFI-NEJAD & JOHN H. DUNNING, THE U.N. AND TRANSNATIONAL CORPORATIONS: FROM CODE OF CONDUCT TO GLOBAL COMPACT (United Nations Intellectual History Project Series, 2008).

[7] Subcomm'n on the Promotion and Protection of Human Rights, Draft Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

[8] See id. ¶ 1.

[9] See The U.N. "Protect, Respect and Remedy" Framework for Business and Human Rights, BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE (Sept. 2010), http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf.

[10] See Comm'n on Human Rights Res. 2005/69, U.N. Doc. E/CN.4/RES/2005/69 (April 20, 2005).

[11] U.N. Secretary General Kofi Annan appointed Harvard Professor John Ruggie in 2005 for a three-year appointment, and Secretary General Ban Ki-Moon continued the assignment for another three-year term in 2008.

[12] See John Ruggie, Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Protect, Respect, and Remedy: a Framework for Business and Human Rights, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

[13] See id.

[14] See H.R.C. Res. 8/7, U.N. Doc. A/HRC/RES/8/7 (June 18, 2008).

Business and Human Rights,[15] proposed by the SRSG and endorsed by the Human Rights Council in June 2011, were the result of this mandate. The Guiding Principles are a landmark in the development of a normative framework for business and human rights, yet the call remains for binding legal standards in this field.

In September 2013, at the 24th session of the U.N. Human Rights Council, a number of countries raised the need to adopt a treaty that would "clarify the obligations of transnational corporations in the field of human rights, as well as of corporations in relation to States, and provide for the establishment of effective remedies for victims in cases where domestic jurisdiction is clearly unable to prosecute those companies."[16] In June 2014, at the 26th session, the Council adopted resolution 26/9, creating an Open-ended Intergovernmental Working Group to produce a "legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[17]

In light of this mandate, this paper analyzes the extraterritorial obligation to protect with a view to informing deliberations toward a legally binding instrument on TNCs and human rights. This paper submits that effective operationalization of the extraterritorial obligation to protect under human rights law is critical to closing existing gaps of protection with regard to corporate accountability for human rights abuses.

B. Imbalance in the International Legal Order

The current international legal order suffers from an imbalance that creates a gap in human rights protection as it relates to business activity. For one, businesses have rights but no obligations under international law. In addition, only host-States have international obligations with respect to their treatment of businesses, while most industrialized States, the home-States to those businesses, continue to fail in upholding their extraterritorial human rights obligations.[18]

This imbalance is aggravated by the operation of IIAs. Under IIAs investors are typically afforded rights and protections, without corresponding obligations related to their human rights impacts. On the other hand, while host-States retain their obligations to protect human rights under human rights instruments, standards of protection in IIAs such as those concerning indirect expropriation or the fair and equitable treatment standard post significant limitations to their ability to regulate in the public interest.

Stabilization clauses offer another example of ways in which IIAs may restrict a host-State's ability to regulate. Stabilization clauses are provisions in State contracts which limit the host-State's regulation of the investment project. Such clauses may require the host-State to exempt the investment from compliance with internal laws or indemnify the investment against costs incurred.[19] Not only does this practice affect the host-State's ability to regulate for the

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[15] John Ruggie, Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Guiding Principles on Business and Human Rights: Implementing the Respect, Protect and Remedy Framework, U.N. Doc. A/HRC/17/31 (March 21, 2011) [hereinafter U.N. Guiding Principles].

[16] Statement on Behalf of a Group of Countries at the 24rd [sic.] Session of the Human Rights Council (September 2013), http://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf.

[17] H.R.C. Res. 26/9, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, U.N. Doc. A/HRC/26/L.22/Rev.1 (June 25, 2014).

[18] See Howard Mann, International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, International Institute for Sustainable Development, Feb. 2008, at 14-25, https://www.iisd.org/pdf/2008/iia_business_human_rights.pdf; Stephanie Barbara Leinhardt, Some Thoughts on Foreign Investor's Responsibilities to Respect Human Rights: Aligning Human Rights and Investment Protection, 10 TRANSNATIONAL DISPUTE MANAGEMENT, no. 1, Jan. 2013, at 6-7.

[19] Stabilization Clause, Practical Law Glossary Item 1-501-6477, Thompson Reuters (2015).

protection of human rights, but it can also put TNCs at a distinct advantage over domestic companies in the market who are obliged to comply.[20]

The investor-state dispute settlement (ISDS) mechanism commonly included in IIAs similarly aggravates the imbalance apparent in the international legal order, since ISDS cannot be relied upon to uphold human rights and environmental protections, especially where these interests are not included in the language of the IIA.[21] Typically, the paradigm emphasizing investors' rights and host-States' obligations prevails.

The imbalances brought about and aggravated by IIAs have been documented in recent years. As a result, varied attempts have been made by international economic organizations to bring balance to the situation by proposing the insertion of clauses into IIAs which recognize the responsibility of investors to respect human rights and the rights of host-States to regulate for the protection of human rights and the environment.[22] The U.N. Conference on Trade and Development, in particular, has issued the 'Investment Policy Framework for Sustainable Development,' which advocates for the voluntary adoption of corporate social responsibility standards by TNCs, which would result in "turning voluntary standards into mandatory requirements."[23]

These attempts have made some headway in balancing the rights and obligations of investors and host-States. However, the limitations are systemic and serious, and they call for structural solutions: ETOs provide such a structural solution. Implementing the home-States' obligations to protect human rights bridges the gaps in human rights protection by rebalancing the legal rights and obligations of host- and home-States with respect to human rights.

C. International State of Play Regarding Extra-Territorial Obligations: The Necessity of Disaggregating the Sources

The Extraterritorial Obligation to Protect

The obligations of States with respect to human rights are three-fold. First, States have an obligation to respect human rights by not interfering with or curtailing the enjoyment of human rights.[24] Second, States have an obligation to protect

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[20] See id.

[21] See Mann, supra note 18, at 25-29; see, e.g., Suez, Sociedad General de Aguas de Barcelona S.A. & Interagua Servicios Integrales de Agua S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on Liability (July 30, 2010) (weighing the rights of investors against the human rights of the population at large).

[22] See, e.g., Southern African Development Community, Protocol on Financing and Investment, Annex 1, Art. 10 (Aug. 18, 2006), http://www.sadc.int/files/4213/5332/6872/Protocol_on_Finance__Investment2006.pdf ("Foreign investors shall abide by the laws, regulations, administrative guidelines of the Host State."); Common Market for Eastern and Southern Africa (COMESA), Investment Agreement for the COMESA Common Investment Area, Art. 32, http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Investment_agreement_for_the_CCIA.pdf ("This Agreement or any action taken under it shall not affect the rights and obligations of the Member States under existing agreements to which they are parties."). See also, Howard Mann, Konrad Von Molkte, Luke Eric Peterson & Aaron Cosbey, IISD Model International Agreement on Investment for Sustainable Development: Negotiator's Handbook, Art. 25 (International Institute for Sustainable Development, 2nd ed., April 2006), https://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf (providing for the "balance of rights and obligations of investors and investments and host states").

[23] U.N. Conference on Trade and Development, Investment Policy Framework for Sustainable Development, 14, (2012), http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-IPFSD.aspx.

[24] See Office of the High Commissioner for Human Rights, International Human Rights Law, UNITED NATIONS HUMAN RIGHTS, http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx.

individuals and groups against human rights abuses by third parties.[25] Third, States have an obligation to fulfil human rights by taking positive action to facilitate the enjoyment of basic human rights.[26]

It is generally accepted that a State's obligations to protect, respect, and fulfil human rights extend to those individuals and entities situated within the territory of the State. But do these obligations extend to people situated outside the State's territory? And if so, under what circumstances? And what conduct do these obligations require from States?

In regard to these questions, certain human rights instruments require States parties to exercise these obligations with respect to the rights of all persons subject to or within their 'jurisdiction.'[27] Other human rights instruments do not contemplate jurisdictional limitations.

It is becoming increasingly recognized in the opinions of international tribunals, human rights treaty bodies, and U.N. special mandates holders, that the 'jurisdiction' of the State, and thereby the spatial scope of its human rights obligations, indeed extends beyond the State's territory in certain circumstances. On that basis, ETOs have been defined generally in human rights law as "the human rights obligations of Governments toward people living outside of its own territory."[28]

This section analyzes current state of play of ETOs with regard to corporate actors and human rights.

The U.N. Guiding Principles on Business and Human Rights

As noted above, the U.N. Secretary General appointed a Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG) in 2005. The SRSG's mandate was renewed in 2008 with the instruction "to provide views and concrete recommendations on ways to strengthen the fulfillment of the duty of the State to protect all human rights abuses by or involving transnational corporations and other business enterprises."[29]

In 2011, the SRSG published, and the Human Rights Council endorsed, the Guiding Principles on Business and Human Rights,[30] which aimed at the creation of global human rights standards for businesses. The Guiding Principles make

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[25] See id.

[26] See id.

[27] Hugh King, The Extraterritorial Obligations of States, 9 HUMAN RIGHTS L. REV., no. 4, at 521 (2009). See, e.g., American Convention on Human Rights art. 1(1), Nov. 22, 1969, 1144 U.N.T.S. 123 ("The States Parties to this Convention undertake to…ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms"); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, 213 U.N.T.S. 221 ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"); International Covenant on Civil and Political Rights art. 2(1), Dec. 19, 1966, 999 U.N.T.S. 171 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant"); Convention on the Rights of the Child art. 2 (1), Nov. 20, 1989, 1577 U.N.T.S. 3 ("States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction"); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2(1), Dec. 10, 1984, 1465 U.N.T.S. 85 ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.").

[28] Jean Ziegler, Report of the Special Rapporteur on the Right to Food, ¶ 35, U.N. Doc. E/CN.4/2005/47 (Jan. 24, 2005).

[29] H.R.C. Res. 8/7, ¶ 4, U.N. Doc. A/HRC/RES/8/7 (June 18, 2008).

[30] U.N. Guiding Principles, supra note 15.

clear that States are the sole bearers of legal human rights obligations, while at the same time corporations bear a 'responsibility to respect' human rights.[31] The introduction to the Guiding Principles clearly states that, "nothing in these Guiding Principles shall be read as creating new international law obligations."[32]

With regard to ETOs the Guiding Principles concluded: "At present, states are not generally required under international human rights law to regulate the extra-territorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a jurisdictional basis."[33] The Guiding Principles do not assert any ETOs, but provide that "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations."[34]

With regard to extraterritorial jurisdiction, the SRSG noted in a 2010 Report that in several policy domains, such as anti-corruption, anti-trust, securities regulation, environmental protection, and general civil and criminal jurisdiction, States have agreed to certain uses of extraterritorial jurisdiction. However, he found that "this is typically not the case in business and human rights."[35]

The SRSG's conclusions regarding the ETO to protect human rights from corporate abuse, were drawn from "an extensive programme of systematic research" on "evolving patterns of international human rights law and criminal law; emerging practices by States and companies; commentaries of United Nations treaty bodies on obligations concerning business-related human rights abuses; the impact of investment agreements and corporate law and securities regulation on both States' and enterprises' human rights policies; and related subjects."[36] However, these conclusions fail to reflect the variation and nuance in international human rights law regarding State extraterritorial obligations, in particular the language of human rights instruments and conclusions drawn by treaty bodies, Special Procedures, and international tribunals.[37] This jurisprudence is considered below.

International Jurisprudence Regarding Home-State Responsibility

The principle that States should exercise due diligence in protecting individuals from human rights violations resulting from the conduct of third parties is well established in human rights jurisprudence. For instance, the Inter-American Court of Human Rights in Velásquez Rodríguez v. Honduras in 1988 held: "An illegal act which violates human rights and which is initially not directly imputable to a State . . . can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention."[38] International tribunals have found that this due diligence obligation also extends extraterritorially, depending on the relationship of the State to the individuals or entities acting abroad. For instance, under customary international law, States are generally responsible for the conduct of non-State actors if those actors are acting as de facto agents of the State.[39] International jurisprudence has evolved to reveal further variations on the State-to-actor relationship which trigger State responsibilities.

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[31] See id., intro. ¶ 6.

[32] Id., at 6.

[33] Id., ¶ 2 cmt.

[34] Id., ¶ 2.

[35] John Ruggie, Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶ 46, U.N. Doc A/HRC/14/27 (April 9, 2010).

[36] U.N. Guiding Principles, supra note 15, intro. ¶ 4.

[37] John Knox, The Ruggie Rules: Applying Human Rights Law to Corporations, in THE U.N. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS 79 (Radu Mares ed., 2012).

[38] Velásquez Rodríguez v. Honduras, Merits, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988).

[39] See Responsibility of States for Internationally Wrongful Acts, Rep. of the Int'l Law Comm'n, 53rd Sess., ch. II, U.N. Doc A/56/10, GOAR 56th Sess., Supp. No. 10 (2001).

An 'effective control' standard was first laid out by the International Court of Justice (ICJ) in 1986 in The Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America).[40] In determining whether the United States could be held responsible for the actions of contra forces in Nicaragua, the ICJ held that the United States could be found responsible for these actions if it were "proved that the State had an effective control of the operations in the course of which the alleged violations were committed."[41]

The Court sought to determine whether the relationship of the contras to the United States Government was "such that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government."[42] Although finding that the United States had largely financed, trained, equipped, armed, and organized the contra forces, the Court was not satisfied that "all the operations launched by the contra force [sic.], at every stage of the conflict, reflected strategy and tactics solely devised by the United States," and ultimately found that there was "no clear evidence that the United States actually exercised such a degree of control as to justify treating the contras as acting on its behalf." [43]

While the Nicaragua case sets a high standard for the invocation of State responsibility with respect to ETOs, it nonetheless acknowledges that ETOs exist in certain cases involving the actions of private actors. Moreover, it provides an important standard that may be applied in certain fact-specific instances involving extraterritorial human rights abuses by TNCs.

More recently, courts have developed the standard of 'decisive influence.' This standard was applied by the European Court of Human Rights (ECtHR) in 2004 in Ilascu and Others v. Moldova and Russia.[44] In determining whether Russia was responsible for harm caused to the applicants by authorities in the self-proclaimed, unrecognized Moldovian Republic of Transnistria, the ECtHR found that because Transnistria was "set up . . . with the support of the Russian Federation, vested with organs of power and its own administration," and survived only "by virtue of the military, economic, financial, and political support given to it by the Russian Federation," it "remain[ed] under the effective authority, or at the very least under the decisive influence, of the Russian Federation."[45] Russia therefore had, "a continuous and uninterrupted link of responsibility for the applicants' fate" and it was "of little consequence that . . . agents of the Russian Federation ha[d] not participated directly in the events complained of in the present application."[46]

This 'decisive influence' standard was also applied by the ICJ in the 2007 Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), [47] where the Court considered the responsibility of the former Federal Republic of Yugoslavia (FRY) for acts of genocide committed by Bosnian Serbs against Bosnian Muslims in Srebrenica. The ICJ found that under the Genocide Convention, the FRY was required to ensure that "any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide [.]"[48] The ICJ elaborated that the use of the term 'influence' reveals a responsibility by the State for the conduct of "not only the persons or entities whose conduct was attributable to the FRY, but also all those with whom the [FRY] maintained close links and on which it could exert a

[40] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 181 (June 27).

[41] Id., ¶ VII.5.

[42] Id., ¶ VII.4.

[43] Id.

[44] Ilascu & Others v. Moldova and Russia, 2004-VII Eur. Ct. H.R. 179 (July 8).

[45] Id. at ¶ 392.

[46] Id. at ¶ 393.

[47] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43 (Feb. 26).

[48] Id. ¶ 435 (citing 1993 I.C.J. 24, ¶ 52(A)(2)).

certain influence."[49] In this case, the ICJ concluded that the FRY had a due diligence obligation with regard to the actions of Bosnian Serbs, stating "In view of their undeniable influence . . . the Yugoslav authorities should . . . have made the best efforts within their power to try and prevent the tragic events then taking shape."[50]

This recent case law suggests that home-States may readily have a due diligence obligation vis-à-vis their TNCs under the 'decisive influence' standard. This standard, as laid out in Ilsacu and Bosnia, is generally reflected in the relationship that home-States have with their TNCs. Home-States often provide financial, political, and other forms of support for TNC activities in other countries. This support may be in the form of negotiation and ratification of IIAs, financing or other services by export credit agencies,[51] diplomatic efforts, or political influence in international financial institutions.[52] More importantly, home-States enable TNCs' legal existence and exert control and influence over TNCs through their own domestic corporate law. Home-States also negotiate international investment treaties which define and influence the international legal framework in which TNCs are able to operate.[53] In light of these factors, home-States arguably exert significant control and 'decisive influence' over their corporate nationals.

This brief analysis of international case law concerning State responsibility for the extraterritorial activities of non-State actors indicates that States do, in fact, have an extraterritorial obligation to protect human rights, through the exercise of due diligence, at least with regard to non-State actors over which they have a certain degree of influence or control. Although the case law to date has addressed ETOs primarily in cases involving armed conflict and extraterritorial occupation,[54] the reasoning underlying the case law provides a legal basis for how these standards may be applied to TNCs.

Analysis of Recent Reports of U.N. Treaty Bodies

Statements by U.N. treaty bodies demonstrate wide support for ETOs with respect to TNCs. While certain U.N. treaty bodies strongly encourage States to regulate the activities of their corporate nationals operating extraterritorially,[55] other treaty bodies have actually indicated a State obligation to do so.

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[49] Id. ¶ 435.

[50] Id. ¶ 438.

[51] For example, some government export agencies offer overseas investment insurance to cover the political and commercial risks borne by TNCs operating abroad. See Bonnie Penfold, Labour and Employment Issues in Foreign Direct Investment: Public Support Conditionalities 10-14 (International Labour Office, Working Paper No. 95, 2005), available at http://www.ilo.ch/wcmsp5/groups/public/@ed_emp/@emp_ent/@multi/documents/publication/wcms_101040.pdf.

[52] See Smita Narula, International Financial Institutions, Transnational Corporations, and Duties of States 143 in M. LANGFORD, ET. AL., GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW (2014).

[53] See Robert McCorquodale & Penelope Simons, Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law (2007), 70 MODERN L. REV., no. 4 at 599 (2007) (demonstrating how States may facilitate or otherwise contribute to situations involving TNC violations through their support and assistance to corporate nationals in global trade and investment ventures).

[54] See, e.g., Nicaragua, 1986 I.C.J. 14 (considering U.S. responsibility for the acts of armed contra forces in Nicaragua); see also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, (June 21) (holding that "Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.").

[55] See, e.g., Committee on the Elimination of Racial Discrimination [CERD], Consideration of Reports Submitted by States Parties Under Art. 9 of the Convention, Concluding Observations of the Committee: Australia, ¶ 13, U.N. Doc. CERD/C/AUS/CO/15-17 (Aug. 27, 2010) ("[T]he Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts of Australian

The Committee on the Rights of the Child (CRC) produced a General Comment focused specifically on business and human rights.[56] Building on the Maastricht Principles,[57] the CRC has explicitly stated that "home States also have obligations . . . in the context of businesses' extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned."[58] According to the CRC, said 'reasonable link' exists where "a business enterprise has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities in the State concerned."[59] This statement casts a wide net of extraterritorial obligation for States Parties to the Convention on the Rights of the Child and its related instruments,[60] as it obliges each State party to regulate not only its own corporate nationals, but also those corporations who carry out substantial business activities in it.

The Committee for Economic, Social and Cultural Rights (CESCR) has reiterated the obligation of States Parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) "to ensure that all economic, social and cultural rights laid down in the Covenant are fully respected and rights holders adequately protected in the context of corporate activities."[61] This statement, using obligatory language, has been made without reference to any territorial limitations. In fact, elaborating on this obligation, the CESCR has stated that "States Parties should also take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant."[62]
The CESCR's emphasis on the extraterritorial dimension of economic, social, and cultural rights obligations is reflected in the Committee's General Comments on the rights to Food, Water and Sanitation, Health, and Social Security. For instance, General Comment No. 19 on the Right to Social Security directly states: "States Parties should extraterritorially protect the right to social security by preventing their own citizens and nationals from violating this right in other countries."[63] General Comment No. 15 on the Right to Water states: "Steps should be taken by States Parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries."[64] General Comment No. 12 on the Right to Adequate Food states: "[A]s part of their obligations to protect people's resource base for food, States parties should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food."[65]

While each of these uses the language of 'should,' each of these statements is made in elaboration on the content of obligations of States parties under the Covenant, supporting the Committee's conclusion that each of these economic, social and cultural rights obligations has an extraterritorial reach.

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corporations which negatively impact on the enjoyment of rights of indigenous peoples domestically and overseas and to regulate the extra-territorial activities of Australian corporations abroad.").

[56] See Comm. On Rights of the Child [CRC], General Comment No. 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights, U.N. Doc. CRC/C/GC/16 (April 17, 2013).

[57] See Maastricht Principles, supra note 4; infra ch. 0.

[58] CRC, General Comment No. 16, supra note 56, ¶ 43.

[59] Id.

[60] Id., ¶ 8.

[61] UN Committee on Economic, Social and Cultural Rights [CESCR], Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social, and Cultural Rights, ¶ 1, U.N. Doc. E/C.12/2011/1 (July 12, 2011).

[62] Id., ¶ 5.

[63] CESCR, General Comment No. 19: The Right to Social Security (Art. 9 of the Covenant), ¶ 54, U.N. Doc. E/C.12/GC/19 (Feb. 4, 2008).

[64] CESCR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), ¶ 33, E/C.12/2002/11 (Jan. 20, 2003)

[65] CESCR, General Comment No. 12: The Right to Adequate Food, ¶ 27, U.N. Doc. E/C.12/1999/5 (May 12, 1999).

In addition to these two treaty bodies which have made clear the extraterritorial application of Covenant obligations, other treaty bodies, while not using obligatory language, do regularly encourage States to regulate the extraterritorial activities of TNCs for the protection human rights. For instance, in its Consideration of Reports submitted by States parties, the Committee on the Elimination of Racial Discrimination (CERD) expressed concern that Canada "has not yet adopted measures with regard to transnational corporations registered in Canada whose activities negatively impact the rights of indigenous peoples outside Canada."[66] The CERD also encouraged Australia to "regulate the extraterritorial activities of Australian Corporations abroad."[67] While the language employed may appear hortatory, the repeated call by treaty bodies for extraterritorial regulation of TNC activities demonstrates strong support for the implementation of ETOs.

An analysis of the opinions of treaty bodies with regard to ETOs also reveals legal standards applied to determine when extraterritorial regulation is warranted. As in the case law examined above, treaty bodies have encouraged States to regulate extraterritorially in situations where the State exercises 'decisive influence' or 'effective control'. The Human Rights Committee has stated that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[68] The Committee Against Torture (CAT) has similarly stated that States should regulate "in all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law."[69] With regard to decisive influence, the CESCR wrote in General Comment No. 15, "where States parties can take steps to influence other third parties to respect the right [to water], through legal or political means, such steps should be taken."[70]
As observed previously, the Committee on the Rights of the Child has also developed the 'reasonable link' standard, stating that home-States have an obligation to regulate TNCs "provided that there is a reasonable link between the State and the conduct concerned."[71] The CRC has also repeatedly called for regulation on the basis of nationality, calling for companies to regulate the activities of corporations with their nationality operating abroad.[72]

Thus, the analysis of the work of U.N. human rights treaty bodies indicates wide support for ETOs.

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[66] CERD, Reports submitted by States parties under Art. 9 of the Convention: International Convention on the Elimination of All Forms of Racial discrimination: addendum: Information provided by the Government of Canada on the implementation of the concluding observations of the Committee on the Elimination of Racial Discrimination: Canada, ¶ 4, U.N. Doc. CERD/C/CAN/CO/19-20 (Apr. 4, 2012).

[67] CERD, supra note 56, ¶ 13.

[68] Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) (emphasis added).

[69] Committee Against Torture [CAT], General Comment No. 2: Implementation of Article 2 by States Parties, ¶ 16, CAT/C/GC/2 (Nov. 23, 2007).

[70] CESCR, General Comment No. 15, supra note 64.

[71] CRC, supra note 56, ¶ 43.

[72] See CRC, Consideration of Reports submitted by States Parties Under Art. 44 of the Convention, Concluding Observations: Azerbaijan, ¶ 29, U.N. Doc. CRC/C/AZE/CO/3-4 (March 12, 2012); CRC, Consideration of Reports Submitted by States Parties Under Art. 44 of the Convention: Concluding Observations: Bahrain, ¶ 21, U.N. Doc. CRC/C/BHR/CO/2-3 (Aug. 3, 2011); CRC, Consideration of Reports Submitted by States Parties Under Art. 44 of the Convention: Concluding Observations: Thailand, ¶ 30, U.N. Doc. CRC/C/THA/CO/3-4 (Sept. 14, 2011); CRC, Consideration of Reports Submitted by States Parties Under Art. 44 of the Convention: Concluding Observations: Turkey, ¶ 23(b), U.N. Doc. CRC/C/TUR/CO/2-3 (July 20, 2012).

Analysis of Recent Reports of Special Procedures of the Human Rights Council

The Special Procedures of the Human Rights Council, which have the mandate of reporting and advising on human rights from a thematic or country-specific perspective, have likewise expressed support for the application of ETOs.

The Special Rapporteurs on the Right to Food, in particular, have made explicit statements acknowledging the obligatory nature of ETOs. In 2006 the Special Rapporteur acknowledged that "The extraterritorial obligation to protect the right to food requires States to ensure that third parties subject to their jurisdiction (such as their own citizens or transnational corporations), do not violate the right to food of people living in other countries."[73] In 2008, the Special Rapporteur laid out the obligation that States "ensure that their international policies of a political and economic nature . . . do not have negative effects on the right to food in other countries."[74] In 2013, the Special Rapporteur explicitly stated that "the duties associated with the right to food extend to all situations, whether located on a State's national territory or abroad, over which a State may exercise influence without infringing on the sovereignty of the territorial State."[75]

Other mandate holders have recognized ETOs as integral to the obligation of international cooperation as laid out in Articles 55 and 56 of the U.N. Charter.[76] The Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment has stated: "Although work remains to be done to clarify the content of extraterritorial human rights obligations pertaining to the environment, the lack of complete clarity should not obscure a basic point: States have an obligation of international cooperation with respect to human rights."[77] The Special Rapporteur on Extreme Poverty and Human Rights stated in a 2014 report: "As part of international cooperation and assistance, States have an obligation to respect and protect the enjoyment of human rights everywhere, which involves avoiding conduct that would foreseeably risk impairing the enjoyment of human rights by persons beyond their borders, and conducting assessments of the extraterritorial impact of laws, policies and practices."[78]

The importance of ETOs in human rights protection is reflected in the work of many other Special Procedures mandates. For instance, the Working Group on Human Rights and Transnational Corporations and Other Business Enterprises has suggested that States "explore the application of extraterritorial jurisdiction in situations where victims

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[73] Jean Ziegler, Rep. of the Special Rapporteur on the Right to Food, ¶ 36, U.N. Doc. E/CN.4/2006/44 (March 16, 2006).

[74] Olivier De Schutter, The Right to Food: Interim Rep. of the Special Rapporteur on the Right to Food to the General Assembly, transmitted by Note of the Secretary General, ¶11, U.N. Doc. A/63/278 (Oct. 21, 2008).

[75] Olivier De Schutter, Right to Food: Interim Rep. of the Special Rapporteur on the Right to Food, ¶ 9, U.N. Doc. A/68/288 (Aug. 7, 2013). The Special Rapporteur has also addressed ETOs in the context of forced evictions due to the production of agro-fuels abroad, and stated that such evictions, "constitute clear violations of the obligations to respect and protect people's existing access to food." Jean Ziegler, Preliminary Report to the Drafting Group of the H.R.C. Advisory Committee on the Right to Food, ¶ 27, U.N. Doc. A/HRC/AC/2/CRP.2 (Jan. 19, 2009). In the same report, the Special Rapporteur called for States to be mindful of their extraterritorial obligations toward the realization of the right to food in subsidizing the industrial fishing sector. Id. ¶ 63(a).

[76] "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." U.N. Charter art. 56.

[77] John Knox, Rep. of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment [Mapping Report], ¶ 67, U.N. Doc. A/HRC/25/53 (30 Dec. 2013).

[78] Magdalena Sepulveda Carmona, Rep. of the Special Rapporteur on Extreme Poverty and Human Rights, ¶ 30, U.N. Doc. A/HRC/26/28 (May 22, 2014). Specifically, the Special Rapporteur has applied the ETO to tax evasion, stating that States should take "concerted and coordinated measures against tax evasion globally as part of their domestic and extraterritorial human rights obligations and their duty to protect people from human rights violations by third parties, including business enterprises." Id. ¶ 62.

face denial of justice in the country where the alleged abuse occurred," and "address legal barriers, such as the legal liability of parent companies for the involvement of a subsidiary in a human rights abuse."[79] The Special Rapporteur on the Right to Adequate Housing has said that concerns about the effects that TNCs may have on the right to housing "has led to important work to assess and clarify issues of corporate accountability, extraterritorial obligations and human rights in relation to trade and investment agreements."[80]

An analysis of the Special Procedures' work demonstrates a collective understanding as to the integral nature of ETOs to human rights and environmental protection where TNCs operate.

International State of Play Regarding Extraterritorial Obligations

Ultimately, disaggregating the sources and thoroughly analyzing the work of international tribunals, U.N. treaty bodies, and Special Procedures indicates that the international community's position on the legal nature of the ETO is more complex than, as the SRSG put it in the Guiding Principles, "not generally required, but not generally prohibited."[81] Not only do many of these bodies strongly support and encourage extraterritorial regulation, but many, in fact, do recognize ETOs in certain cases.

In 2011, a group of international legal experts developed the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights,[82] aimed at clarifying ETOs and providing guidance and a legal basis for its effective implementation. Although the principles address ETOs with respect to economic, social and cultural rights, this focus does not exclude their applicability to all human rights.[83] As such, the Maastricht Principles provide a useful model for the development of a legally binding instrument to effectively regulate, in international human rights law, the activities of transnational corporations and other business enterprises by clarifying and delineating the content and application of ETOs.

The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights

Aim and Legal Value of the Maastricht Principles

The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights were adopted in September 2011 by a group of experts in international law and human rights convened by Maastricht University and the International Commission of Jurists.[84] These experts came from universities and organizations located in all regions of the world, and included current and former members of international human rights treaty bodies, regional human rights bodies, and former and current Special Rapporteurs of the U.N. Human Rights Council.[85]

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[79] Rep. of the Working Group on Human Rights and Transnational Corporations, ¶ 70, U.N. Doc. A/69/263 (Aug. 5, 2014).

[80] Leilani Farha, Rep. of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, ¶¶ 52, 85, U.N. Doc. A/69/274 (Aug. 7, 2014).

[81] See Guiding Principles, supra note 15, ¶ 2 cmt.

[82] See Maastricht Principles supra note 4.

[83] See id., ¶ 5.

[84] See Olivier De Schutter, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon, & Ian Seiderman, Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 34 HUMAN RIGHTS Q. 1084, 1084 (2012).

[85] See id.

A Commentary to the Maastricht Principles was later written by members of the drafting group who facilitated the elaboration of the Principles.[86]

The meeting and its resulting instrument were aimed at clarifying the content of extraterritorial State obligations with a view to advancing and giving full effect to the Charter of the United Nations and international human rights law, particularly in the context of economic globalization.[87] The meeting was concerned with the lack of accountability and regulation for TNCs, intergovernmental organizations, and international financial institutions as well as the lack of human rights considerations in international investment and trade laws, policies, and disputes.

The Maastricht Principles are premised on the global and universal nature of human rights and the notion that human rights are owed erga omnes to the international community as a whole.[88] However, the Principles do not create new legal norms. Rather, they articulate the current state of international law regarding ETOs, reflecting many of the conclusions drawn by international tribunals, U.N. treaty bodies, and Special Procedures.[89] In particular, the Maastricht Principles provide a basis for conceptualizing the application and implementation of ETOs in order to secure more effective protection of human rights from third-party violations.

Structure and Content of the Maastricht Principles

The Maastricht Principles are divided into seven sections. The first section sets out the General Principles of human rights and States' obligations with respect to human rights. The second section defines the scope of extraterritorial obligations of States. The third, fourth, and fifth sections address the extraterritorial dimensions of the obligations to respect, protect, and fulfil human rights respectively. The sixth section addresses the obligation of a State to ensure the availability of effective remedies and accountability mechanisms. The seventh section sets out the final provisions relating to the limitations of ETOs, and emphasizes that the Principles should not be invoked by States in order to limit their territorial obligations.

Definition and Scope of the Extraterritorial Obligations of States

Principle 8 defines two types of obligations as extraterritorial. The first are obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory.[90] The second are obligations of a global character, set out in the Charter of the United Nations and in human rights instruments, to take action separately and jointly through international cooperation, to realize human rights universally.[91]

Principle 9 provides that these ETOs are triggered in three jurisdictional situations. First, the State has extraterritorial obligations in situations over which the State exercises authority or effective control, whether or not such control is exercised in accordance with international law.[92] This 'effective control' standard is consistent with that expressed in the international jurisprudence and treaty body opinions discussed above.[93] As noted, this standard may be applicable to TNCs in certain situations where States exercise a certain amount of authority or control over their corporate nationals.[94]

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[86] Id.

[87] See Maastricht Principles, supra note 4, pmbl. ¶8

[88] See De Schutter, et. al., supra note 84, at 1103, 1142, 1166.

[89] See infra, ch. 3.

[90] Maastricht Principles, supra note 4, ¶ 8(a).

[91] Id., ¶ 8(b).

[92] Id., ¶ 9(a).

[93] See infra sections 3.3-3.4.

[94] See infra section 0.

Second, the State has extraterritorial obligations in situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social, and cultural rights, whether within or outside its territory.[95] The obligation of a State in this situation would arise where State authorities knew or should have known that the presence or conduct of TNCs in a particular location would bring about substantial human rights abuses in another country.[96]

Third, the State has extraterritorial obligations in situations in which the State, acting separately or jointly, whether through its executive, legislative, or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law.[97] This 'decisive influence standard' reflects the case-law analyzed above and is further consistent with the recommendations made by various U.N. treaty bodies and Special Procedures which recommend or encourage states to take steps to influence third parties through legal or political means.[98]

In order to address the need for mechanisms that guarantee the effective implementation of ETOs, Principles 36-38 articulate the obligations of States to provide for accountability mechanisms, including full and thorough monitoring of compliance with human rights obligations, and prompt, accessible, and effective remedies, which lead to thorough and impartial investigation, cessation of the violation, and adequate reparation, including, as necessary, restitution, compensation, satisfaction, rehabilitation, and guarantees of non-repetition.[99]

Taking into account State sovereignty concerns in the exercise of extraterritorial jurisdiction, Principle 10 sets out limitations on the scope of extraterritorial jurisdiction, providing that a State's obligation to respect, protect, and fulfil does not authorize a State to act in violation of the U.N. Charter and general international law.[100] This means that the exercise of extraterritorial jurisdiction by a State does not justify intervention in the domestic affairs of the territorial state, interference with its sovereign rights, or hampering the principle of equality of all States.[101]

Content of the Extraterritorial Obligation to Protect

Sections III, IV, and V of the Principles lay out the substantive content of the obligations to respect, protect, and fulfil economic, social, and cultural rights extraterritorially. Section IV (Principles 23-27), in particular, addresses the substantive content of the extraterritorial obligations to protect.

Principle 23 reiterates the general obligation that "All States must take action, separately, and jointly through international cooperation, to protect economic, social and cultural rights of persons within their territories and extraterritorially[.]"[102]

Principle 24 sets forth the obligation to regulate, providing that "All States must take necessary measures to ensure that non-State actors which they are in a position to regulate, . . . such as private individuals and organizations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social,

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[95] Maastricht Principles, supra note 4, ¶ 9(b).

[96] See Commentary to the Maastricht Principles, supra note 84, at 1136.

[97] Maastricht Principles, supra note 4, ¶ 9(c).

[98] See infra section 3.4-3.5.

[99] See Maastricht Principles, supra note 4, ¶ 36-38.

[100] Id. ¶ 10.

[101] See Commentary to the Maastricht Principles, supra note 84, at 1141-42. The ICJ in Nicaragua, 1986 I.C.J. 14, ¶ 205, further elaborated on the principle of non-intervention holding that it "Forbids all States . . . to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State Sovereignty, to decide freely[.]. . . Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones."

[102] Maastricht Principles, supra note 4, ¶ 23.

and cultural rights."[103] These measures include administrative, legislative, investigative, adjudicatory and other measures.[104] Furthermore, Principle 24 provides that all other States have a duty to refrain from nullifying or impairing the discharge of this obligation.[105]

Principle 25 prescribes the circumstances which elicit the obligation to protect extraterritorially. Under Principle 25, "States must adopt and enforce measures to protect" in circumstances where "the harm or threat of harm originates or occurs on its territory;"[106] where "the non-State actor has the nationality of the State concerned;"[107] or where "any conduct impairing . . . rights constitutes a violation of a peremptory norm of international law."[108] Principle 25 further elaborates that "where any conduct impairing . . . rights constitutes a crime under international law, States must exercise universal jurisdiction over those bearing a responsibility or lawfully transfer them to an appropriate jurisdiction."[109]

These bases for protection are consistent with principles of jurisdiction found in customary international law. Under customary international law, a State may exercise jurisdiction on the bases of territoriality, nationality, and universality. The territoriality principle grants a State jurisdiction over conduct which takes place within its own borders; this is known as subjective territoriality.[110] Under the territoriality principle, a State may also acquire jurisdiction over conduct which takes place outside of the State's borders, but which has effects within its borders; this is known as objective territoriality.[111] Under the principle of nationality, a State may have extraterritorial jurisdiction if one or more of its nationals is the victim or perpetrator of a violation.[112] Finally, under the principle of universality, any State may exercise jurisdiction when a situation involves exceptionally egregious violations of human rights.[113] These principles are reflected in Principle 25.

Under Principle 25, States also have an obligation to protect when, "as regards business enterprises, . . . the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activity, in the State concerned[.]"[114] This standard, as well as the territoriality-, nationality-, and universality-based standards, are consistent with current international jurisprudence which recognizes ETOs in cases where the State exercises 'effective control' or 'decisive influence' over the non-State actor.[115] Principle 25 also articulates the 'reasonable link' standard, similar to that put forth in General Comment No. 16 of the Committee on the Rights of the Child,[116] providing that States have an obligation to protect "where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-State actor's activities are carried out in that State's territory."[117]

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[103] Id., ¶ 24.

[104] Id.

[105] Id.

[106] Id., ¶ 25(a).

[107] Id., ¶ 25(b).

[108] Id., ¶ 25(e).

[109] Id., ¶ 25(e).

[110] See SEAN MURPHY, PRINCIPLES OF INTERNATIONAL LAW 240-45 (1st ed. 2006).

[111] See id. at 242-45. For further jurisprudence regarding the applicability of the territoriality approach, see Legal Consequences of the Construction of the Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

[112] See MURPHY, supra note 110, at 242-45.

[113] See, e.g., Attorney-General of Israel v. Eichmann, 36 I.L.R. 277 (Isr. Sup. Ct. 1962) (finding Israel's exercise of jurisdiction proper under the principle of universality, despite the fact that the State of Israel did not exist at the time of Eichmann's participation in Nazi acts of genocide).

[114] Maastricht Principles, supra note 4, ¶ 25(c).

[115] See infra section 0.

[116] See CRC, General Comment No. 16, supra note 56, ¶ 43.

[117] Maastricht Principles, supra note 4, ¶ 25(d).

Principle 26 provides that if the State is "in a position to influence the conduct of non-State actors, even if they are not in a position to regulate such conduct, such as through their public procurement system or international diplomacy, [the State] should exercise such influence, in accordance with the Charter of the United Nations and general international law, in order to protect economic, social, and cultural rights."[118] This is consistent with the principles of international cooperation set out in the U.N. Charter[119] and with repeated calls by human rights treaty bodies and Special Procedures for States to exercise their influence over non-State actors for the protection of human rights.[120]

Finally, Principle 27 requires that States "cooperate to ensure that non-State actors do not impair the enjoyment of the . . . rights of any persons. This obligation includes measures to prevent human rights abuses by non-State actors, to hold them to account for any such abuses, and to ensure an effective remedy for those affected."[121]

Implications

ETOs should be operationalized in a legally binding instrument on transnational corporations and other business enterprises with respect to human rights.

Effective operationalization of the extraterritorial obligation to protect under human rights law is critical to closing existing gaps of protection with regard to corporate accountability for human rights abuses. The articulation of ETOs in an internationally legally binding instrument on TNCs and other business enterprises with respect to human rights would also confront the structural imbalance apparent in the international legal order that privileges business interests above human rights protections.

The Maastricht Principles provide the basis for the operationalization of ETOs in an internationally legally binding instrument regarding TNCs and other business enterprises with respect to human rights.

The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights comprehensively lay out the content and scope of ETOs as reflected in international human rights law. As such, the Maastricht Principles provide the legal basis for the operationalization of ETOs with respect to all human rights in an internationally legally binding instrument regarding TNCs and other business enterprises and should be looked to for guidance in this task.

Conclusion

The Open-ended Intergovernmental Working Group's elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights is a vital legislative moment in the decades-long process of achieving adequate and effective accountability mechanisms for corporations operating abroad. The codification of ETOs in such an instrument will close the protection gaps resulting from TNC violations of human rights that is endemic in the current legal order, and it will ultimately bring greater protections and remedies to affected individuals and communities throughout the world.

This paper analyzes home-States' obligations to protect human rights extraterritorially. As documented, ETOs are currently established in international human rights law, and their application to TNC and other business activities is further supported by the work of international tribunals, treaty bodies, and U.N. Special Procedures. Despite widespread

[118] Id., ¶ 26.

[119] See U.N. Charter arts. 55, 56.

[120] See infra, sections 0-0.

[121] Maastricht Principles, supra note 83, ¶ 27.

support of ETOs with respect to business and human rights, serious gaps remain as to their effective implementation. Therefore, the adoption of an international legal instrument that sets forth a binding legal framework for the implementation of ETOs can help close the gaps that lead to corporate impunity.

The Maastricht Principles provide the clarity concerning issues of definition, scope, and content of ETOs that is needed to establish concrete and workable international standards on the matter, on the basis of accepted principles and norms of international law. The Maastricht Principles thus provide a comprehensive basis for the codification of ETOs in the legally binding instrument on TNCs and other business enterprises and human rights.

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Written statement* submitted by Franciscans International, a non-governmental organization with general consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[24 June 2015]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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Introductory Remarks

On June 25, 2014 the UN Human Rights Council (HRC) in Geneva adopted - by majority vote - Resolution 26/9 on the elaboration of an international legally binding instrument on transnational corporations (TNCs) and other business enterprises with respect to human rights. After more than three decades of initiatives, voluntary commitments, and global campaigns, the adoption of this resolution represents a concrete measure in the fight against corporate impunity and the lack of accountability for corporate human rights abuses. Unregulated economic globalization and unscrupulous business practices systematically challenge human rights. Human rights abuses by corporations are becoming pandemic. During the second UN Forum on Business and Human Rights in December 2013, the Nobel Prize laureate Joseph Stiglitz stressed the need for "stronger norms, clearer understandings of what is acceptable—and what is not—and stronger laws and regulations to ensure that those that do not behave in ways that are consistent with these norms are held accountable."[1]

Resolution 26/9 calls for the establishment of an Intergovernmental Working Group (IGWG) with the mandate to elaborate the international instrument. Through the establishment of an IGWG, States will discuss the content and the scope of such an instrument (hereinafter the Treaty) in an open, transparent, and participatory process, in which civil society will have the opportunity to engage. The first two sessions of the IGWG will be dedicated to constructive dialogue on the content, scope, nature, and form of a future treaty on business and human rights.

General Assessment

As a result of economic globalization, we have observed ever increasing international division of labour and fragmentation of business enterprises into myriads of single legal entities operating in each continent. This fragmentation and internationalization of business is compounded by a development model based on opening developing countries' economies to unscrupulous foreign investment and unchecked business, attracting foreign capital for fast profits in a race to the bottom.

Communities and individuals continue to suffer from environmental degradation, social conflict, inequality, landlessness, precarious working conditions, discrimination, violence, and denial of access to justice. This indicates that more robust regulatory and accountability mechanisms are needed and overdue. The global south is disproportionately affected by business-related human rights abuses. Binding, uniform international standards for TNCs and other companies will promote business behaviour that is more respectful of the human rights of all people.

Franciscans International (FI) advocated in favor of the adoption of Resolution 26/9. FI's monitoring and investigation of cases in more than 30 countries allows us to conclude that existing voluntary measures are ineffective. FI's call for an international treaty responds to demands coming from our partners, grassroots movements, indigenous peoples, peasants, workers, and others whose rights are affected by business activities.

Franciscans International has consistently denounced the adverse effects that extractive industries, agri-business, and other development mega-projects have had on local communities, indigenous peoples, human rights defenders, women, children, and other marginalized groups. By negative impact we refer to the consequences on peoples' full enjoyment of their human rights at any stage of business activity. Widely documented abuses include infringements on the rights to life and physical integrity, the right to freedom of expression, right to health, right to water and sanitation, right to food, right to housing, right to livelihood, right to cultural life, and right to non-discrimination. The disruption of the social fabric and environmental degradation are among the most frequently cited negative impacts, together with repression, violence, and killings of those who oppose or are critical of development projects. In many cases, armed conflicts and civilian victims accompany disputes over natural resources. Unchecked business also entails practices of forced labour and the phenomenon of human trafficking – with child victims in both.

[1] Joseph E. Stiglitz's keynote speech to panel on Defending Human Rights, Geneva, December 3, 2013.

Relation to the Guiding Principles

We see gaps in the UN Guiding Principles on Business and Human Rights and have observed that in this case good intentions have not translated into concrete change for local communities. Nonetheless, Franciscans International asserts that the development of a treaty in the field of business and human rights does not interfere with the implementation of the Guiding Principles. The Treaty and the Guiding Principles would not conflict: the two processes are complementary and mutually reinforcing. The Treaty process will build on the way already paved by the Guiding Principles and fill in the gaps. The Guiding Principles helped shape a common language in the field of business and human rights and some elements should inspire the work of the IGWG, in particular with regard to prevention and due diligence.

Terminology

Business enterprises:[2]	By the term "business enterprises," we refer to any business entity with a designated business purpose regardless of the international or domestic nature, including but not limited to corporations (including transnational), contractors, subcontractors, suppliers, licensees, and distributors. This includes any legal form that business entities can establish, including corporations, partnerships, sole proprietorships, and cooperatives. We also include any economic form, irrespective of its legal personality, that they can establish such as groups of enterprises, undertakings and joint ventures. In the text, the term "business enterprise" is interchanged with "companies".
Human rights:	By the term "human rights", we refer to all internationally recognized human rights, including the rights contained in the core human rights instruments as well as the principles concerning fundamental rights in the ILO Core Conventions.
Treaty:	By the term "Treaty" we refer to an international legally binding instrument.

General Recommendations

The process and outcome of elaborating a treaty on business and human rights must contribute to the effective protection of individuals and communities affected or threatened by companies. Franciscans International recommends that the IGWG chair, members, and observers ground the content of the Treaty in the reality and experiences of affected people and communities.

The objective of a treaty in the field of business and human rights should be to further strengthen States' obligations in international human rights law with respect to human rights abuses committed by business enterprises. The main role of a treaty should be to complement and enhance the existing framework, fill in governance gaps, and increase accountability for the corporate sector. The principles of universality, indivisibility, and interdependence of all human rights should be adequately guaranteed by the Treaty. The Treaty should be informed by the human-rights principles of empowerment and agency, transparency, participation, inclusion, non-discrimination, and equality.

The Treaty should:

Establish effective mechanisms to prevent, investigate, punish, and remedy corporate abuses, including access to justice for affected people.

Address corporate impunity in situations where the State is not able or not willing to uphold its duty to protect.

[2] As also used in the terminology of the Guiding Principles.

Require States to enact policies that ensure that business enterprises respect human rights and act with mandatory due diligence.

Ensure that States fulfil human rights using all appropriate means, including through national legislation and international cooperation.

On the Scope

Duty-bearers

The primary responsibility to promote and protect human rights lies with the State. States must protect against human rights abuses by third parties, including TNCs and other business enterprises. It follows that the Treaty should set out clear obligations for States and require States to enact appropriate policies and regulations to ensure prevention of abuses, accountability for business companies, and remedies for victims.

International law, and especially international human rights law, has traditionally had States as the only treaty parties and duty-bearers. Under this treaty States will be responsible to ensure that business enterprises respect human rights through national legislations and policies. The implementation of an international treaty requires the power, authority, and regulation that are inherent to States.

Broad Coverage: TNCs and Other Business Enterprises

Resolution 26/9 gives the IGWG the mandate to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises." With a footnote in the preamble, the definition of "other business enterprises" is limited to those that have a transnational character in their operational activities, thereby excluding local business.

There are significant gaps in human rights protection due to the lack of regulation and accountability of TNCs as well as to the ineffective application of human rights law to development, investment, and trade agreements. TNCs are cross-border by nature and have a high degree of mobility and fluidity in relation to the country of incorporation, production, management, and financial investment. Their role in the global market is increasing and TNCs are able to escape accountability by placing themselves in-between legislations, taking advantage of territorial limitations of jurisdictions, and forum shopping best to protect their interests. Therefore differential consideration of the modus operandi of TNCs should be clearly addressed as one of the main elements within the scope of the Treaty.

However, a Treaty that focuses only on TNCs would fail to effectively address the reality of the global phenomenon and thus fail to effectively fill governance gaps and protect all victims from abuses committed by business enterprises. Limiting the scope of the Treaty to TNCs would undermine the very objectives of the Treaty. Several argument support that the Treaty scope must include all business enterprises.

The human rights principle of non-discrimination requires that all business enterprises, irrespective of their size, sector, and the domestic or global nature of their operations be held responsible for respecting human rights throughout their operations. Victims of abuses by local business companies are entitled to the same human rights protection as victims of abuses by TNCs. In other words, if a legally binding instrument is developed for the purpose of protecting those who are negatively impacted by business activity, it should not matter whether the business enterprise is a TNC or a domestic company. For the victim, the form of corporate organization is irrelevant.
Much of what is referred to as "domestic business" is in fact part of a globalised chain and is fully integrated as a key piece of the international business architecture. Should domestic companies not fall under the scope of the Treaty, this would imply exclusion of the supply chain that feeds the international market but is technically considered national. If there are no rigorous provisions regarding human rights due diligence in the supply chain, those companies would fall outside the scope of the Treaty.

The size and magnitude of many domestic companies enable them to significantly shape policies for their own profit and advantage. Their impact on human rights can be comparable to TNCs.
Millions of people across the world, especially in jurisdictions with low enforcement of laws and regulations, experience human rights abuses in the workplace. Most domestic legal systems fail to adequately address issues of human rights abuses by business enterprises. The Treaty could serve to create a level playing field and fill in national governance gaps.

Forced labour in the garment industry
In the global garment industry, TNCs organize their production so that through subcontracting and outsourcing, local and informal workshops are incorporated in the supply chain. Where labour conditions are analogous to slavery and the employees' safety is mostly disregarded, the big retailers do not conduct human rights due diligence throughout the supply chain. They appear unwilling or unable to effectively trace their supply chain, or claim not to know the circumstances in which the garments are made. By demanding production at such low cost, retailers in effect oblige their producers to contract those local producers that can deliver at the lowest cost, often those with the greater disregard for human rights. Through organizational and fiscal structures, the big retailer avoids its duty to ensure human rights compliance in its supply chain, while domestic companies are pressured to engage in practices abusing rights and amounting to slavery to stay in business. To ensure the Treaty covers not only those big retailers buying from local factories and workshop, but also the owners of these local factories and workshops, the scope needs to extend to include all business enterprises.

Slavery and exploitation in the agricultural sector, the case of tomatoes
In the agricultural sector of many countries, in particular in Southern Europe, the harvest of tomatoes is done by migrant workers. Large industries of tomato production feed into the global market of canned tomato, pizza sauce, and ready-made food for big food corporations, including TNCs. Their work is governed by the so-called *caporalato* phenomenon. Farm owners hire a *caporale* – a supervisor who is charged with the task to employ unskilled and cheap labourers. The caporale makes agreements with such workers, and the workers are subsequently fully dependent on the caporale with regards to their living conditions, transportation to the fields, and food. In the majority of cases, this form of agricultural industry entails the following abuses: forced labor; trafficking; debt bondage because of illegal recruitment fees; contracts substituted for inferior ones; travel documents and salary withheld; confinement; isolation and no communication; excessive hours without time off; physical or sexual abuse; and destruction of identification documents; illegal harassment and extortion; detention and abuse. For a caporale, it is favourable to work with immigrants who do not have a regular residence permit. In many countries illegal workers can be immediately expelled. Therefore, they are easily blackmailed and forced to accept very little pay and harsh working conditions. For these kind of abuses to be included the scope of the treaty should be extended to all business enterprises

Broad Coverage: Universality, Indivisibility and Interdependence of Human Rights

The principles of universality, indivisibility, and interdependence of all human rights in business-related issues should be guaranteed in the Treaty. Because of the interlinkages of human rights abuses committed by business enterprises, a Treaty that would only cover gross human rights violations fails to ensure protection to all victims because it would exclude most of the human rights abuses committed by companies (including the adverse impact on rights to food, housing, water, health, self-determination, and adequate standard of living). In order to ensure full protection, the Treaty should refer to all human rights, including the impacts on lives and health of people caused by environmental damage.

The Territorial Scope – Extraterritorial Jurisdiction

One of the main expectations for the Treaty is that it will extend the territorial scope outside national territories. Having considered the role of TNCs in the global market, their ability to escape accountability by taking advantage of limitations of territorial jurisdictions, and considering the geographical fragmentation and internationalization of the globalised business, we are convinced that any attempt to limit obligations territorially would lead to the failure to effectively protect human rights against corporate abuses.

States that condone or facilitate abuses committed by entities under their jurisdiction are complicit in those violations. The Treaty should aim at extending the obligations of States to protect human rights against any abuses committed by business enterprises outside their territories to address the impunity of TNCs for human rights abuses they commit or participate in.3

The Treaty should cover the two main and related types of extra-territorial jurisdiction, namely:
Prescriptive jurisdiction: The power of a State to regulate people, property, entities and transactions, or to prescribe conduct, usually through the passage of laws or regulations.
Adjudicatory jurisdiction: The power of a court to hear a case.4

A treaty should require States to empower their courts to exercise extraterritorial jurisdiction in order to ensure accountability of TNCs. With the obligation to guarantee access to justice and effective remedies for victims, the home States of TNCs will have a key role in combatting corporate impunity.

Extraterritorial jurisdiction will not interfere with States' efforts to implement their own territorial obligations. Rather it will facilitate such policies and act in complementarity when the State in which the abuse has occurred is unwilling or unable to react appropriately.

Through the inclusion of the extraterritorial component, the Treaty will ensure universal protection of human rights in the globalization process.

Conclusions and Recommendations

The Treaty should:
Cover the entire range of human rights, including the rights contained in the core human rights instruments,5 as well as the principles concerning fundamental rights in the ILO Core Conventions. The principles of universality, indivisibility and interdependence of all human rights in business-related issues should be adequately guaranteed in the Treaty.
Have an extended scope to include all business enterprises—domestic, foreign, and transnational.
Aim at States as duty-bearers and require them to enact legislation and policies to ensure all business enterprises respect human rights.
Explicitly establish extraterritorial obligations of States.

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[3] For more, see Olivier de Schutter, Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations (2006), http://198.170.85.29/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf.

[4] Prescriptive and adjudicatory jurisdictions are inextricably interconnected. Prescriptive jurisdiction concretely implies adjudicative extraterritorial jurisdiction.

[5] See list of the Core International Human Rights Instruments and their monitoring bodies, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx.

Key Elements

Prevention

The Treaty should clearly establish obligations of States to prevent human rights abuses by business enterprises.

States should require companies of a certain size and impact to adopt policies and procedures and other standards of conduct aimed at preventing, mitigating, monitoring, and accounting actual or potential adverse human rights impact related to their operations wherever they are carried out. States should also require companies to periodically report on due diligence processes and their impacts, including for parent companies to report on the global operations of the entire enterprise.6 States should ensure monitoring and compliance with due diligence process and ensure that those companies that do not observe these standards are held liable, and that remedies are available in cased where human rights abuses occur.

Preventive measures must include business operations taking place in countries other than the country where the business may be domiciled or headquartered.7

Mandatory due diligence process should apply to the complexity of structure of the TNCs and other companies, in particular to parent companies8 in relation to the activities of their subsidiaries (controlled companies). Mandatory due diligence should also apply to major retailers in their entire supply chain process.

Legislative Developments in France
The French National Assembly adopted a draft law requiring French multinationals to enact due diligence plans to prevent human rights and environmental abuses. Those companies that fail to engage in this due diligence process and plans would be ordered to do so by the judiciary and for persisting failures they will be fined for non-compliance.9 Unfortunately, the substantive provisions of the draft law were significantly watered down due to strong opposition by business lobbies. Consequently, a provision aimed at shifting the burden of proof in cases of corporate abuses involving French multinational companies was removed. The initial provision had placed the burden of proof on parent companies in terms of proving that they were not in fact in control of the activities of their subsidiaries and subcontractors. In addition, the law now would only apply to companies with more than 5,000 employees in France or 10,000 worldwide.

Slavery in the supply chain of prawns for large US and UK retailers
A recent investigation revealed Asian slave labour producing prawns for the global shrimp supply chain involving US and UK markets. This case illustrates one dimension of the complex supply chains that connect slavery to leading producers and retailers.10 In particular the investigation revealed Asian 'ghost ships' that enslave and kill workers. Slaves are forced to work in certain Asian countries for no pay for years under threat of extreme violence, in the production of seafood supplying large retailers in Western countries. The

[6] Guiding Principles: Principles 1 and 2.

[7] For example, in a recent communication of the Human Rights Committee to Canada, the Committee requested information regarding "measures taken or envisaged to monitor the human rights conduct of Canadian oil, mining, and gas companies operating abroad". Human Rights Committee, International Covenant on Civil and Political Rights, List of issues in relation to the sixth periodic report of Canada, UN doc. CCPR/C/CAN/Q/6 (21 Nov. 2014), para. 4.

[8] Parent companies are those corporations that own and entirely or partly control another company.

[9] Devoir de vigilance des multinationales: un "premier pas historique", France Info (Mar. 31, 2015), http://www.franceinfo.fr/actu/monde/article/devoir-de-vigilance-des-multinationales-un-premier-pas-historique-662601.

[10] Revealed: Asian slave labour producing prawns for supermarkets in US, UK, The Guardian (Jun. 10, 2014), http://www.theguardian.com/global-development/2014/jun/10/supermarket-prawns-thailand-produced-slave-labour.

investigation found that one of the world's largest prawn farming companies, buys fishmeal to feed to its farmed prawns from suppliers that own, operate, or buy from fishing boats (ghost ships) manned with slaves working in horrific conditions, including 20-hour shifts, regular beatings, and torture, and execution-style killings. These prawns are then sold to food distributors and international supermarkets, as well as food manufacturers and food retailers, as frozen or cooked prawns and ready-made meals. The company in question admitted that slave labour was part of its supply chain.

Mandatory Human Rights Impact Assessment

For businesses of a certain size, considering the scale of impact of their operations, an independent human rights and environmental impact assessment should be required prior to a proposed activity. The result of the independent assessment should guide future steps and operations of the business activity. This human rights and environmental assessment should be informed by the principles of transparency, participation, equality, inclusion, and non-discrimination. Assessments should be carried out by independent authorities and should place special attention on the impact on women and the role they play in the community and society. Both in terms of impact as well as the participatory process of the assessment, specific attention should be given to gender, marginalisation, poverty, and challenges faced by specific groups such as indigenous peoples, women, minorities, religious minorities, and children, persons with disability, migrant workers, and human rights defenders. The impact assessment should take into consideration specific risk factors that would lead to gender-based violence, sexual abuses, violence and repression of freedom of expression and association, disappearances and killings.

Mandatory Consultation and Access to Participation

Mandatory consultation and access to effective participation for potentially affected communities are critical to prevent harm, abuses, and conflict. Participation of potentially or actually affected communities should be meaningful and carried out in a manner that takes into account language, social, and hierarchical barriers for all sectors of the community. Participation and consultation obligations should be in line with the rights recognised by the UN Declaration on the Rights of Indigenous Peoples.

Preventive measures as applied to the extractive sector

The extractive sector is one of the most critical in terms of adverse human rights impact. Preventive measures are needed to avoid abuses, violence, killings, and social conflict involving local communities, indigenous peoples, peasants, women, and children.

Mining projects take place in different stages. Thorough human rights due diligence plans and processes must be conducted and strictly monitored throughout all stages. In particular, States should require extractive companies to adopt code of conducts that effectively identify, prevent, stop, and remedy abuses. Emphasis should be placed on States' obligations to determine its policy based on meaningful consultation processes with potentially or actually affected communities. Additionally, the plans must include measures to prevent involuntary resettlement and destructive practices, gender-based violence and discrimination, child labour, pollution and environmental damage, and on clear plans for rehabilitation after the end of the project.

An independent environmental and human rights impact assessment should be prepared at a very early stage to prevent, identify, and mitigate any harm. Public consultations should be carried out in a way that respects traditional customary rules and decision-making and these consultations must inform the assessment. At the conclusion of a project, a company should be held accountable for rehabilitation of the area so that the environment is recovered. The costs for this must be estimated by the assessment in advance, in consultation with independent experts, and secured by the company in a safe and ad-hoc fund for rehabilitation.

Another important element in preventing adverse environmental and human rights impact is the establishment of so-called "No Go Zones." This label refers to places in which it has been identified that extractive projects would pose too great risks to the natural and/or social environment. This type of land zoning ought to ban

extractive activities from certain lands for instance.

Protection of Human Rights Defenders and Whistle Blowers

Human rights defenders are a particularly vulnerable group in the context of human rights abuses by business companies or violations by State actors with the complicity of business companies. They often operate in a context where there is a strong collusion between the State and economic powers and where the authorities prioritise economic interests over the rights of the local population. Protests against corporate activity are often repressed with violence and excessive use of force, terrorist charges, preventive charges, killings, and disappearances. This happens with the direct or indirect complicity of the companies that defend their interest with the support of the State action or acquiescence.[11] Whistle blowers must also be protected. Many times those who denounce abuses occurring inside a business enterprise fear for their lives and jobs, and they have to cope with corruption and bribery.

The Treaty should explicitly require States to ensure an "enabling environment" for human rights defenders that oppose or denounce business activities or hazardous working conditions. This includes requiring States to refrain from criminalizing social and peaceful protest. The Treaty should also require States to protect human rights defenders from violence by police and private military and other security forces often put in place to defend the business and its interests. The physical and psychological integrity of human rights defenders should be guaranteed in all circumstances.

Conclusions and Recommendations

The Treaty should clearly establish obligations for States to prevent human rights abuses by all business enterprises States should require companies of a certain size and impact to adopt and periodically report on their policies and procedures and other standards of conduct aimed at preventing, mitigating, monitoring, and accounting for actual or potential adverse human rights impacts they cause or with which they are complicit, wherever they operate or cooperate.

Mandatory due diligence process should apply to parent companies in relation to the activities of their subsidiaries irrespective of where they operate. Parent companies should report on the global operations of the entire enterprise. Mandatory due diligence should also apply to companies of certain size in their entire supply chain.

States should ensure monitoring and compliance mechanisms for due diligence processes by ensuring enforcement of the legislation and ensure that those companies that do not observe these standards are judicially compelled to do so and failing that are held liable, and that remedies are available when human rights abuses occur.

For business enterprises of a certain size, considering the scale of impact of their operations, an independent human rights and environmental impact assessment should always be required prior to a proposed activity. Special attention should be placed on the impact on women and children in the prevention of human rights abuses. The impact assessment, in process and outcome, should pay special attention to challenges faced by specific groups such as indigenous peoples, minorities, and religious minorities, persons with disabilities, migrant workers, and human rights defenders.

States should ensure mandatory and meaningful consultation and participation of potentially affected communities in decision making, which is critical to prevent harm, abuses, and conflict. In specific sectors, such as extractive industries, States should ensure that companies do not undertake activities before obtaining the free, prior, and informed consent of the local community.

The State should protect those working on human rights concerns arising from business activities. Human rights defenders resisting or denouncing the impact of business activities must not be subjected to criminal sanctions, repression, intimidation, harassment, or murder.

[11] As also highlighted in: Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai. Human Rights Council, session 29, Paragraph 23 and 72(c)(iv). Ref. A/HRC/29/25.

In order to prevent human rights abuses, States should ensure respect of human rights in all trade, investment, and other business-related bilateral or multilateral agreements, treaties, and contracts with other states. A human rights based approach should be explicitly mentioned in such agreements and must prevail in case of conflict.

Accountability

One of the main objectives of the Treaty is to engender legal liability for corporate abuses. Corporations may be directly or indirectly implicated in human rights abuses. Direct corporate involvement in human rights abuses include activities undertaken by the management or employees of the corporation, including torture, slavery, unlawful detention, disappearances, and intimidation of those opposing or denouncing corporate behaviours and activities. Business enterprises are also indirectly involved in a series of human rights abuses and this would include corporate complicity and contribution to human rights violations. In line with mandatory due diligence recommendations, the Treaty should also state that failures to observe human rights due diligence process lead to legal liability.

Failed attempts to address accountability gaps in Canada
In Canada there have been several legislative initiatives to fill accountability gaps for abuses committed by Canadian mining companies.12 Most recent was Bill C-300, the "Corporate Accountability of Mining, Oil, and Gas Corporations in Developing Counties Act".13 Bill C-300 would have withdrawn governmental support to companies violating human rights standards. The stated purpose of the Act was "to ensure that corporations engaged in mining, oil or gas activities and receiving support from the Government of Canada act in a manner consistent with international environmental best practices and with Canada's commitments to international human rights standards."14 The Act contained provisions related to codes of conduct for companies, clear criteria conditioning governmental support on compliance with those standards, and authority for the government to investigate acts of noncompliance. Unfortunately the Bill was narrowly defeated in October 2010 by a margin of only 6 votes.

Direct involvement in human rights abuses

The Treaty should clearly provide for statutory cause of actions for human rights abuses committed by business enterprises.

The Treaty should define a list of key offenses with appropriate criminal, civil, and administrative liability for business enterprises (legal persons) and persons working for them (natural persons), and specify internationally recognized crimes against human rights. The Treaty should require States to prosecute corporations and their directors for those crimes.15 Corporate liability (for legal persons) should not prevent liability for natural persons (the employees of the company). Criminal proceedings should not prevent victims from seeking remedies according to civil remedies law.

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[12] *See* Working Group on Mining and Human Rights in Latin America, *El impacto de la mineria canadiense en América Latina y la responsabilidad de Canadá* (2013), pp. 102-04. See also Franciscans International, Canada's Mining Interests in Latin America, submission for Human Rights Committee 112th session (July 2014).

[13] House of Commons of Canada, Bill C-300, 2nd Session, 40th Parliament 57-58 Elizabeth II, 2009.

[14] *Id.* para. 3.

[15] For example, Article 3 of the Optional Protocol on the Sale of Children (OPSC) provides: "Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative." The offenses referred to in paragraph 1 are: sexual exploitation, transfer of organs, forced labour, illegal adoption of a child, child prostitution.

Indirect involvement and complicity in human rights abuses

In addition, the Treaty should also clarify cases in which business enterprises contribute to and participate in human rights abuses, including through omission or negligence, and define clear types of corporate complicity. Complicity should be understood as co-responsibility in criminal offences. This involves a set of indirect ways in which companies can have an adverse impact on rights through their relationships or ties.

There are different types and levels of complicity:
Active complicity: complicity in the commission of the offence.
Passive complicity: omissions and failures to act. This may occur when it may be beneficial for the company to remain silent (so-called silent complicity).

Complicity may occur when it is another entity that commits abuses and this entity (public or private, domiciled in the same country or abroad, with or without legal status) is "related" to the business enterprise in question. The definition of this "relationship" is key to establish liability. Complicity may include outsourcing and sub-contracting of services that involve human rights abuses or the involvement of business activities in a context where a State systematically violates human rights. It could involve subsidiaries, sub-contractors, suppliers, as well as other kinds of economic partnerships, undertakings, or group of enterprises, joint ventures, and any other kind of economic entity of which they may be part. Complicity also encompasses situations where the business enterprise directly or indirectly assists or benefits from human rights abuses committed by others.

Legal liability and complexity of corporate structures

The Treaty should clarify liability for human rights abuses in complex corporate structures, including the liability of the parent companies for abuses committed by the subsidiary. This is particularly crucial for TNCs. The two entities have separate legal entities and this separation (corporate veil) poses challenges for attributing legal responsibility to the parent company by isolating, fragmenting, and diluting the responsibilities of each entity.

To circumvent the barrier of the corporate veil, European litigators addressing overseas corporate human rights abuses have been applying the "duty of care" doctrine. According to the duty of care doctrine, responsibility is attributed to the parent company based on its omission or failure to exercise its duty of care vis-à-vis the activities carried out by its subsidiary. This doctrine has helped overcome jurisdiction challenges but has not allowed litigators to effectively pierce the corporate veil and hold the parent company liable.

A procedural challenge in relation to the application of the "duty of care" is the disclosure of documents to prove the connection between the parent company and its subsidiaries. When dealing with TNCs, information about the responsibility of the parent company for a given activity is often exclusively in the possession of the company itself. A possible solution to overcome this challenge would be to shift the burden of proof. Concretely, this could mean a presumption that the parent company was in control of its subsidiary unless otherwise proven. The Treaty should clarify cases in which the parent company will be presumed to be liable for abuses committed by its subsidiary.

Conclusions and recommendations.

The Treaty should:
Establish criminal, administrative, and civil liability for human rights abuses with a clear reference to all existing and recognised human rights, as expressed and guaranteed by international law, in the forms of treaties, customary international law, general principles, and other sources of international law.
Establish corporate criminal liability for certain severe human rights violations such as torture, slavery, and environmental damage and consequent harm to individuals or groups of individuals.
Ensure that corporate liability for legal persons does not prevent liability for natural persons.
Ensure that criminal proceedings do not prevent victims from seeking remedies according to civil law.
Clearly define liability for parent companies, including a presumption of negligence by the parent and causality links between the harm and the role of the parent company.
Identify and criminalize situations of complicity in an offence, including negligence and omission, as well as passive or silent complicity.

Establish liability in complex corporate structures such as the TNCs, as well as in context of joint ventures or groups of undertakings with separate legal status where the joint action is harmful.

Remedies

The Treaty must require States to provide civil damage remedies for victims of human rights abuses in which business enterprises are involved.

When the activities of business enterprises cause harm individuals, communities, and workers should be able to seek remedies. Existing gaps in national and international legal regimes for holding business enterprises, in particular TNCs, accountable for their role in human rights abuses prevent victims from claiming damages and perpetuate corporate impunity. These obstacles range from the financial and legal obstacles to the complex legal structure of TNCs.

Existing barriers related to seeking remedies

There are numerous interrelated procedural and practical challenges to bringing claims against corporations, in particular against TNCs:

Legal, jurisdictional, and procedural barriers.
Territorial limitations. As mentioned in previous paragraphs, in situations where host States are either unwilling or unable to provide access to justice for victims of human rights abuses, the extraterritorial jurisdiction is critical to ensure effective remedies for victims. A number of UN and expert recommendations have called for the extension of territorial jurisdiction in order to effectively guarantee access to justice for victims.16

Failed legislative attempts to ensure affective access to justice for victims of Canadian mining companies.17 There have been several failed legislative attempts to fill the legal gaps the keep victims from accessing justice in Canada. Bill C-323 (formerly C-354) was a legislative initiative launched in 2009 that aimed to amend the Federal Courts Act in the interest of international promotion and protection of human rights.18 It was an innovative bill modeled after the United States' Alien Torts Claim Act. If it had been approved, it would have expressly recognized the authority of the Federal Court system to order remedy for foreign victims of human rights violations, including genocide and torture, as well as environmental harms and violations of labor rights.19

Jurisdiction of courts. Victims' attempts to seek remedy in home State courts are frequently rejected on jurisdictional challenges.20 The general rule is that courts where the company is domiciled will have jurisdiction. This general rule is challenged however by the forum non-conveniens doctrine which allows a court to decline to exercise jurisdiction if a better forum exists. This doctrine is used frequently in the US, Canada, and Australia. Conversely in the European

[16] For a compilation of UN recommendations about extraterritorial obligations: http://www.etoconsortium.org/en/library/documents/

[17] For more information see: Franciscans International, Blue Planet Project of the Council of Canadians and the Mining Working Group at the UN: Joint submission on Canada 114th Session of the UN Human Rights Committee, Geneva, June 29-July 24, 2015

[18] See http://this.org/blog/2011/11/01/corporate-accountability-bill-c-323/.

[19] See, Charis Kamphuis, Canadian Mining Companies and Domestic Law Reform: A Critical Legal Account, German Law Journal, vol. 13, no. 9 (2012), p. 1473.

[20] *See* for example the cases from Canada highlighted in: Working Group on Mining and Human Rights in Latin America, *El impacto de la minería canadiense en América Latina y la responsabilidad de Canadá* (2013), pp. 112-13.

Union, as result of a decision by the European Court of Justice (ECJ),21 the doctrine of forum non conveniens has been abandoned.

Precedent-setting court decision
Three connected cases were brought against HudBay Minerals before the Ontario Supreme Court of Justice (Canada) for its imputed responsibility for violent acts in Guatemala, namely the rape of eleven indigenous women and the murder of an indigenous leader.22 In 2013 the Court took the precedent-setting decision to allow this lawsuit to be heard in Ontario, dismissing the company's attempts to have the case dismissed on jurisdictional grounds, inter alia.

The complexity of corporate structures, including the corporate veil. The intricate structures and relationships of corporations often lead to the fragmentation of responsibilities through a system of "Chinese boxes." This fragmentation multiplies possibilities for choosing jurisdictions and hence allowing business enterprises to shop for the best forums for their corporate interests. As mentioned above, European litigators circumvent the corporate veil obstacle though the "duty of care" doctrine. However, this doctrine does not solve the barrier of the corporate veil. Piercing the corporate veil is rare in tort cases. The corporate veil is already lifted in some domains, like in EU antitrust law for example.23 The Treaty should clearly establish the circumstances in which the corporate veil is to be lifted and the parent company held directly liable. The Treaty should also provide for a presumption of negligence in the duty of care by the parent company in order to shift the burden of proof in favour of the victims.

Disclosure of documents to prove the connection between the parent company and its subsidiaries. When dealing with TNCs particularly, information as to which enterprise was responsible for a given activity is often exclusively in the possession of the company itself. Furthermore, the level of disclosure of documents varies across countries. While in the US there are extensive disclosure procedures that enable the claimant to have access to information that can be used in litigation, in most EU countries access to documents is extremely limited. In the UK, the general rule is the proportionate disclosure of documents. A possible solution to overcome this challenge would to shift the burden of proof: the Treaty could establish a presumption that the parent company was in control unless it can prove otherwise.

Gaps in legal codifications which lead to the situation where no cause of action exists for victims to make a claim and which thus make it impossible to achieve justice.

Statutes of limitation restrict the possibility for prosecution after a certain time period, thereby hindering access to justice and the fight against impunity. When the statute of limitations expires in a criminal case, the court no longer has jurisdiction.

Italian court acquitted Eternit on the grounds of statute of limitations
In November 2014, an Italian court declared an acquittal in the infamous Eternit case, which involved the deaths of hundreds of workers from asbestos poisoning. The acquittal was due to the statute of limitations, leaving the 263 victims and their families without redress. Prosecutors in Turin called for a new trial of Eternit's former owner. On February 13, 2012 the court found the defendants guilty of negligence and sentenced them to 16 years imprisonment. In June 2013 an Italian appeals court increased the sentence against a first defendant to 18 years in prison for causing the death of 3000 people. The court dropped charges against a second defendant

[21] The European Court of Justice [ECJ] in its decision *Owusu v. Jackson* [Trading as "Villa Holidays Bal-Inn Villas" and others] foreclosed the use of the doctrine of "*forum non conveniens*" in United Kingdom Courts. See also art. 27 of EU Regulation so-called Brussels I.

[22] For more information see website Choc v HudBay Minerals Inc, http://www.chocversushudbay.com/.

[23] For example: The Parent-Subsidiary Relationship in EU Antitrust Law and the AEG Telefunken Presumption: Between the Effectiveness of Competition Law and the Protection of Fundamental Rights. Prof. Lorenzo Federico Pace, Università degli Studi del Molise - Facolta di Economia http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2536463

because he died in May 2013. On November 19, 2014, the Italian Supreme Court overturned the lower court's decision and acquitted the former on the grounds that the statute of limitations had passed.24

Unavailability of class or collective actions: these kinds of actions are not available in all legal systems.25 If class actions are denied, individual cases can be prohibitively expensive.
The quantification of damages. In some jurisdictions, the rules dealing with a harm suffered abroad provide that the local level of damages will apply. This is often very low in developing countries, and it does not translate into a real deterrent for companies. In addition, often the real costs and damages of business activities such as extractive activities are difficult to understand and recognized. Some damages may be difficult to quantify with standard tools of economics. For example, the loss of traditional livelihoods in hunting, fishing, and farming can rarely be traced and quantified.

Practical and financial barriers.
Magnitude of the imbalance between claimants and defendants. TNCs have sufficient means available to hire strong law firms, whereas victims mostly rely on small law firms which do not have similar funding.
Victims are discouraged by 'loser-pays rules' that exist in certain jurisdictions requiring the losing litigant to pay the legal costs incurred by the other party.
Other barriers.
Besides the above listed barriers, other external factors prevent victims from seeking and achieving remedies. Corruption, political interference, and fear of reprisals can hinder legal processes and deter victims' attempts to demand justice. If a court succeeds in deciding a case favourably, enforcement problems can still obstruct achieving justice.

Conclusions and recommendations

The Treaty should:
Require States to ensure that through judicial, administrative, legislative or other appropriate means, victims have access to effective judicial remedy.
Explicitly require States to exercise jurisdiction over human rights abuses committed by their companies outside their territories, in particular in situations where host states are either unwilling or unable to provide effective remedies for victims.
Establish the general rule that Courts have jurisdiction in the State where the company is domiciled.
Clearly establish the circumstances in which the corporate veil is lifted and the parent company is to be held liable.
Establish a presumption that the parent company was in control of its subsidiary and provide for the presumption of negligence in the duty of care by the parent company, in order to shift the burden of proofs in favour of the victims.
Require States to establish clear causes of actions. Causes of actions should not dictate any statute of limitations or other periods of prescription that endanger accountability and remedies.
Require States to establish the possibility for collective actions in their legal systems.
Damages should be adequately quantified taking into account the relevance of the damage for the victims. Sanctions should act as a deterrent for companies.
Clearly address any financial barriers such as the loser-pay-rules and the high overseas litigation costs by addressing the legal and procedural barriers that increase these costs.

[24] Stephan Schmidheiny, Eternit billionaire's asbestos jail term overturned, Nov. 20, 2014, http://www.swissinfo.ch/eng/eternit-billionaire-s-asbestos-jail-term-overturned/41125556.
[25] For example, while class actions are possible in Canada, US, South Africa and Australia, in Germany they would not be possible.

Monitoring and Compliance – International Mutual Legal Assistance

International monitoring

To ensure compliance, an international monitoring and supervision provision should be included in the Treaty. The Treaty should establish an efficient and effective body for international supervision, empowered to monitor the implementation of the Treaty provisions. The monitoring body should require States to report periodically on the situation concerning abuses involving business enterprises under their jurisdictions. This body could play a key role in launching inquiries and in proposing specific investigation measures.

International judicial cooperation and mutual legal assistance.

International judicial cooperation and mutual legal assistance will be critical in international actions to effectively enforce the Treaty and to complement provisions on extraterritorial obligations. Effective cooperation in investigation and prosecutions is also essential in international actions. States should provide extensive cooperation between national judicial and law-enforcement authorities. It is therefore essential that States cooperate in collecting evidence or statements, conduct research, and provide information, including financial and business records. Lastly, States should develop and maintain communications channels and establish, when necessary, joint teams to appropriately assist one another in research and training.

Franciscans International (FI) is an international non-governmental organization with general ECOSOC consultative status, working for the promotion, protection, and respect of human rights, as well as social and environmental justice. Since its establishment in 1989, FI has used advocacy as a tool to combat and curb human rights abuses. FI relies on the expertise and first-hand information of a large network of partners working with the most vulnerable strata of society in approximately 160 countries. From our offices in Geneva and New York, FI works together with grassroots movements and national and international civil-society organizations to advocate at the United Nations for structural changes addressing the root causes of injustice.

United Nations A/HRC/WG.16/1/NGO/5

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Human Rights Council
Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights
First session
Geneva, 6 – 10 July 2015

Written statement* submitted by International NGO Forum on Indonesian Development, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[24 June 2015]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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We, the undersigning of this statement, are Coalition of Indonesian Civil Society. We are submitting our position into the first session of Open-Ended Intergovernmental Working Group (OEIWG) on proposed work on internationally legally binding instrument on transnational corporations and other business enterprises with respect to human rights:

We welcomes the resolution of UN Human Rights Council of A/HRC/RES/26/9, 14 July 2015 which put the foundation of "internationally legally binding" on entities and operations of transnational corporation and other business enterprises with respect to human rights. We take a very strong attention and dedication to the process, and to the development of such instrument.

We are looking forward for this OEIWG to work and to involve organizations, rights groups, and those who are burdened by the adverse impact from transnational corporations and other business enterprises.

Fundamentally, we see the basis into legitimacy of such instruments. Those are:

1. The existing The Guiding Principles on Business and Human Rights is voluntary in nature, and limited in its norm and legality on putting the accountability of TNCs and other business enterprises with respect to human rights. Furthermore, there are not mechanism where victims of, survivors of, and the affected of the abuses of TNCs and other business enterprises.

2. Global economy is, in fact, expansion and deepening of legality and operation of TNCs and other business enterprises. This is predominantly facilitated by national governments by means of international treaties. Mostly this is developed by abusing human rights promotion and protection. State has obligation to develop legal framework for promotion and protection of human rights. This very obligation is overruled by treaties of trade and investment arising mostly from WTO (World Trade Organization), free trade agreements, bilateral investment treaties. The assessment of Baseline Studies Business and Human Rights in ASEAN (2013) explains that such treaties and agreements is eroding state's regulatory space.

3. Free trade agreement and bilateral investment treaties keep on upholding the assumption of opening market access to facilitate TNCs and other business enterprises, and imposing the rule where state is in fact tools for such access. Effectively, such agreement and treaties, including the mechanism of Investor-state Dispute Settlement (ISDS) are dismantling the state obligation for promotion and protection of human rights.

4. The ethical basis of states implies the protection of citizens from direct and indirect harm from transnational abuse. The ethical basis, enshrined in constitutional foundation of UN member states, including, Indonesia is deliberately pushed out by primacy and legality of TNCs and business enterprises. Those primacy and legality are dismantling this ethical basis.

5. The dismantling of state obligation is in fact the heart of practices of transnational trade and investment, especially those who are stated in free trade agreement. This further facilitates the proliferation and transnationalisation of TNCs and other business enterprises. Effectively, this expands the legal power of TNCs and other business enterprises.

6. The proliferation and expansion of legal power increases abuses in respect to human rights. Those grow and prolong practices of impunity and irresponsibility. In fact, such abuses are blurred by different false justifications and public-relations works. Those abuses should have been punitive by state obligation on promotion and protection of human rights.

To those basis, it is important to strengthen state obligation, and to put TNCs and other business enterprises into international law and governance with respect to human rights.

Into the legally binding instruments, we reiterate the foundation of basic human rights norms:

1. Standard-setting

The purpose of instrument is of standard setting. This will start with minimum requirement and progressively developed.

2. Non-discrimination

The instruments will identify discriminations created by free-reign transnational corporations and (transnational) business enterprises. The term discrimination is already established by United Nations where it denote:

"...should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms"

This also could reach point where it applies to "thematic" human rights, such as on water, as follow
"Non-discrimination: Water and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds"

Progressively, this will also cover where transnational corporations and (transnational) business enterprises impact their entity and operation upon individual and collective setting of rights and physical human being. This will see how far the entity and operation, directly and indirectly, create and effecting human rights abuses.

3. State-obligation

State should willingly and ably perform their duty to promote and protect human rights. Within the framework of Vienna Convention on Law on Treaties, state should develop an international framework for national and extraterritorial obligation.

4. Mechanism

International mechanism is set into governing transnational corporations and other business enterprises with respect to human rights. This should put the mechanism as accountability mechanism, and, when necessary, asking the full responsibility of home state of TNCs and business enterprises.

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Written statement* submitted by Law Society of England and Wales, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

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I. Introduction

The United Nations Human Rights Council decided in June 2014 to establish an Intergovernmental Working Group to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises." The first meeting of the Working Group will take place in Geneva in July 2015.

The Council did not further specify what sort of instrument should be drafted. The Center for Human Rights of the American Bar Association and the Law Society of England and Wales invited the present authors to prepare a "White Paper" on possible options for a treaty on business and human rights.

The Paper takes no position for or against a treaty, or any particular form or content of a treaty. It is purely informational. It represents the views only of its authors, not necessarily those of the American Bar Association or its Center, or of the Law Society. Although other experts provided helpful comments on earlier drafts, the authors are solely responsible for the content.

The Paper begins by summarizing the context of the treaty process and current international law on business and human rights. It then addresses three main topics:

- Treaty Options: The wide variety of forms and content a treaty could take;
- Templates: Forms of treaties that enjoy broad support in international law, which could serve as templates for a treaty on business and human rights; and
- Cross-cutting issues: Issues of international law and policy that drafters may need to address, regardless of the form and content of a treaty (companies covered; applicable rights; law governing civil damages suits; geographic scope of State duties; parent company responsibilities; and whether to impose duties only on States or directly on business).

II. Background and Context

A broad consensus has emerged that business has a responsibility to respect human rights. A recent survey reports that senior executives of companies "overwhelmingly perceive a responsibility to protect human rights." In 2014 all member States of the UN Human Rights Council called upon "all business enterprises to meet their responsibility to respect human rights in accordance with the [UN] Guiding Principles [on Business and Human Rights]."

This consensus is reflected in the UN Framework on Business and Human Rights, endorsed by the Council in 2008, and the UN Guiding Principles on Business and Human Rights, endorsed by the Council in 2011. The Framework has three "Pillars":

- The State duty to protect against human rights abuses by business (Pillar One);
- The business responsibility to respect human rights (Pillar Two); and
- The responsibility of States and business to provide effective access to remedies (Pillar Three).

While the business responsibility to respect human rights arises partly from existing law, it rests more generally on the "basic expectation society has of business," which is part of a company's "social license to operate." The business responsibility is twofold. First, companies should not violate human rights. Second, they should exercise "due diligence" to anticipate and avoid or mitigate adverse impacts on human rights arising from their activities.

All three Pillars of the Framework were elaborated by the 2011 UN Guiding Principles, which provide more specific guidance for States and business. Implementation of the Guiding Principles is now being promoted by international bodies; States; many businesses and industry associations; bar associations; civil society; and a UN Working Group of five independent experts.

Nonetheless, doubts about the effectiveness of this "soft law" approach, especially with regard to remedies for victims, led Ecuador and South Africa in 2014 to ask the UN Human Rights Council to begin a process to draft a legally binding treaty. By a plurality vote of 20 States in favor, 14 opposed, and 13 abstaining, the Council agreed to establish an Intergovernmental Working Group to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises." The Group's first meeting will take place in Geneva in July 2015.

III. Existing International Legal Obligations of Business with Regard to Human Rights

Current international law imposes certain human rights obligations on business, but the coverage is incomplete, indirect and largely ineffective. International human rights law obligates States to protect human rights from infringement by business, but the obligations relating to business are vague and general. International labor law and international criminal law impose specific obligations on business, but their coverage is narrow. Most treaties in all three bodies of law are not universally ratified, and none grants victims effective remedies against companies.

IV. Treaty Options

There is a wide range of possibilities for the form and content of a treaty on business and human rights. They range from a comparatively weak treaty that would simply mandate public reporting by large companies, to a strong treaty with civil and criminal remedies in national and international courts.

The global coalition of NGO's calling for a treaty, as well as the lead governmental sponsors, advocate a treaty that comes closer to the "hard" end of the spectrum. However, it is not clear that any treaty that ultimately emerges from a drafting process will meet these objectives. Most options outlined in this Paper would not fully meet the goals of leading treaty proponents, such as Ecuador and the global NGO coalition, to provide broad accountability for companies and accessible remedies for victims.

This Paper does not attempt to catalogue all treaty options; there are simply too many. It outlines illustrative options, each modeled partly on existing international law binding States in regard to human rights, anti-corruption or environmental law. Each potential template is already either widely ratified or recently adopted. Thus there is reason to believe that its form, at least, may be generally acceptable to States.

The Paper presents the options in two broad categories: treaties mandating mainly national action; and treaties establishing international enforcement machinery. (A treaty could of course mandate both.) Within each category, the listing proceeds, roughly speaking, from relatively "weak" to relatively "hard" options. Each option could constitute either an entire treaty, or one component of a broader treaty. The Paper notes advantages and disadvantages of each treaty option.

A. National Action:

1. Business Reporting: A treaty might require corporations to report publicly on their human rights policies, risks, outcomes and indicators.

2. State Planning: A treaty might require States to adopt National Action Plans to implement the UN Guiding Principles and other norms.

3. Business Implementation of Guiding Principles: A treaty might commit States to require business to carry out its responsibilities under Pillars Two and Three of the UN Guiding Principles. In particular, States might require business to exercise human rights "due diligence."

4. Framework Treaty: A treaty might initially adopt a generally worded "framework," committing States only to broad principles, later to be supplemented by more specified duties, through additional protocols (i.e., treaty supplements) or actions, based on review of experience over time.

5. Criminalization: A treaty might specify certain internationally recognized crimes against human rights, and require States to prosecute corporations and corporate executives and to cooperate with each other in doing so. The form of such a treaty could be modeled on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Such a treaty might also provide a defense or mitigation for companies that could demonstrate they had robust due diligence programs in place.

6. Prevention: A treaty might require criminal prosecution and international cooperation, but add provisions requiring States to seek to prevent human rights violations by business through policies, practices, periodic review, independent prevention bodies, reporting and international collaboration. The form could be modelled on the widely ratified UN Convention against Corruption.

7. Civil Remedies: A treaty might require States to provide civil damages remedies for victims of human rights violations in which business is involved. Legal and practical barriers to access to justice would need to be addressed.

8. Comprehensive National Protection: Existing human rights treaties impose wide-ranging duties on States to protect people from human rights violations, including violations committed by third parties. A treaty might make explicit and precise how States must implement those treaties with regard to business.

B. International Supervision:

1. State Reports: A treaty might require States periodically to report to committees of international experts on progress and obstacles in implementing their treaty obligations. As with current human rights treaties, the reporting process might allow civil society to submit "shadow reports," and authorize the committee to dialogue with States in public hearings and to publish concluding observations. This commitment would need to be harmonized with other UN treaty reporting procedures.

2. Individual Complaints: A treaty might follow existing UN human rights treaties, which allow individuals to file complaints against States before expert treaty bodies, once the complainants exhaust domestic remedies or show good cause for not doing so. A threshold question is whether to allow complaints against States, companies, or both. The answer might depend on the nature of the obligations imposed by the treaty, and on whether they mandate conduct by States, companies, or both. A complaint procedure might build on the existing procedure before "National Contact Points" under the OECD Guidelines for Multinational Enterprises.

3. International Civil Adjudication: A treaty might establish an international court to hear civil complaints, and to issue legally binding judgments granting reparations to victims, against States or companies or both. Regional human rights courts in Europe, Africa and the Americas currently order such reparations against States.

4. International Mediation and Arbitration: A treaty might create or make use of an international arbitral tribunal to hear complaints by victims against companies allegedly involved in human rights violations. A proposal to create such a tribunal has recently been circulated; if that tribunal is established beforehand, a treaty might then mandate States to require companies to submit to its jurisdiction, or the treaty itself might require business to submit to its jurisdiction.

5. International Criminal Prosecution: A treaty might authorize companies and business executives to be prosecuted before an international criminal court. The existing International Criminal Court can prosecute individuals, including business executives, for genocide, war crimes and crimes against humanity. A Protocol recently adopted by the African Union, but not yet entered into force, would both broaden the list of international crimes that could be prosecuted before the African Court of Justice and Human and Peoples' Rights, and permit corporations to be prosecuted.

6. Comprehensive treaty: The foregoing potential elements of a treaty are not mutually exclusive. A treaty could combine some or all, and others besides. Including more elements could make a treaty more effective. On the other hand, the more ambitious the treaty, the more difficult it may become to negotiate and to attract States to join it.

C. Policy Coherence Treaties:

1. National Laws: The UN Guiding Principles call on States to ensure that their laws and institutions affecting business are coherent with their duty to protect human rights. Examples include "corporate law and securities regulation, investment, export credit and insurance, trade and labour" as well as professional codes regulating the legal profession. A treaty might require States to review their laws, or to adopt particular measures (such as including human rights criteria in public procurement policies), to ensure policy coherence.

2. International Agreements: The Guiding Principles further provide that "States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises." States might agree, for example, to include human rights protections in future investment and trade treaties. They could also agree to treat human rights conditions as terms of existing treaties.

D. Sectoral Treaties: It would also be possible to adopt a narrower treaty, focusing on a particular sector or on business involvement in certain kinds of human rights abuses.

V. Selected Key Issues

Whatever form or content of treaty is selected, a number of cross-cutting issues will need to be considered:

A. Companies to regulate: UN resolutions cover transnational corporations "and other business enterprises." The UN Guiding Principles apply to "all" business enterprises, although the extent of "due diligence" required may vary with the size of a business. Yet a preambular footnote in the Human Rights Council resolution initiating the treaty process appears to limit "other business enterprises" to those with a "transnational character." Treaty drafters will need to consider this controversial limitation.

B. Human rights norms: The range of human rights covered by the treaty may depend on the duties it imposes. Reporting and planning might cover a broad range of rights. The UN Guiding Principles recognize the business responsibility to respect, at minimum, all rights in the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the ILO Declaration of Fundamental Principles and Rights at Work. Other rights may apply in specific circumstances. On the other hand, individual complaints or civil damages remedies might be limited to "justiciable" rights. And criminal prosecutions would apply only to crimes under existing law, or any new crimes recognized by the treaty.

C. Law governing civil damages claims: If the treaty authorizes a civil damages remedy in national courts, it might do so either for violations of international human rights law, or for violations of domestic tort law. Human rights claims would more appropriately recognize the gravity of violations, but domestic tort/delict standards might be more familiar to local judges and easier to apply. One solution might be to contemplate both kinds of remedies.

D. Extraterritorial jurisdiction: International law allows States to engage in reasonable exercises of jurisdiction over the conduct of their corporations in other States. A treaty might explicitly authorize, or even require, States to exercise jurisdiction over human rights violations committed by their companies outside their territories.

E. E Parent company responsibility: In regard to reporting, planning and prevention, there is precedent to require parent companies to exercise due diligence to make sure that subsidiaries and other entities in the enterprise meet their responsibilities. In regard to civil or criminal liability, however, most States recognize the separate entity doctrine which treats parents and subsidiaries as different legal entities. Typically the parent cannot be held legally liable for wrongs committed by the subsidiary, except in very limited

circumstances in which the corporate "veil" is pierced. On the other hand, recent developments in common law jurisdictions recognize that, in some circumstances, parent companies can be held liable for breaching a "duty of care" owed to persons injured by their subsidiaries. Drafters will need to consider such issues under the treaty.

F. Direct obligations on business: Eminent scholars disagree on whether corporations are subjects of international law. Pragmatists argue that the issue of whether or not corporations are "subjects" of international law is irrelevant to the question of what legal responsibilities can be imposed on them. Current investment and trade treaties grant corporations both substantive and remedial rights. Drafters might address whether a treaty should also impose duties on corporations.

G. Lawyers and business advisors: Bar Associations, lawyers and others advising companies need to take into account the responsibility of business to respect human rights. Treaty drafters might wish to ensure policy coherence of professional codes regulating the legal profession with State duties to protect human rights from infringement by business.

CONCLUSION

This Paper is presented in the belief that an informed negotiating process deserves, at the outset, a basic awareness of the main options, issues and choices that lie before the drafters.

I. INTRODUCTION

A plurality of the United Nations Human Rights Council member States decided in June 2014 to establish an Intergovernmental Working Group "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[1]

Led by Ecuador and South Africa and supported by 20 Council member States (14 States opposed, including the US and the UK, while 13 abstained), and preceded by advocacy by hundreds of civil society organizations, the Council thus initiated a process to draft a treaty on business and human rights. The first meeting of the Working Group is to take place in Geneva in July 2015; the drafting process will likely take years.

There are many questions as to what will happen once the Working Group convenes. Will the negotiations succeed? If there is to be a treaty on business and human rights, what kind of treaty? Possibilities range from a treaty imposing minimal reporting requirements on corporations to one authorizing a special court where business entities may be sued or criminally prosecuted for human rights violations. What are the key issues the drafters will need to address under various treaty options? And if some form of treaty is adopted, what are its chances of being widely ratified by States? Or will it risk becoming, in effect, an international law orphan?

The American Bar Association Center for Human Rights, and the Law Society of England and Wales invited the present authors to prepare an informational "White Paper" on these questions. The Paper does not intend to advocate either for or against a treaty on business and human rights. Nor does it undertake to support or oppose any particular form or substance of a treaty. Its purpose is purely informational: to educate ABA and Law Society members and other interested persons about treaty issues and options. Views expressed in this Paper are strictly those of the authors, and not necessarily those of the ABA or its Center for Human Rights, or of the Law Society.

The remainder of this Paper is divided into four sections: background and context; existing international legal obligations of business in regard to human rights; options for the content of a treaty; and selected key issues.

II. BACKGROUND AND CONTEXT.

A generation ago it was often argued that only States had institutional responsibilities to safeguard human rights, and that only State actors could violate human rights. In recent years the predominant view has changed dramatically. By 2014 a reputable survey indicated that senior corporate executives "overwhelmingly perceive a responsibility to protect human rights,"[2] while all 47 member States of the UN Human Rights Council (including the US), acting by consensus, called upon "all business enterprises to meet their responsibility to respect human rights in accordance with the [UN] Guiding Principles [on Business and Human Rights]."[3]

How did we arrive at this new consensus?

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[1] UN HRC Res. 26/9, 26 June 2014, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, par. 9.

[2] Economist Intelligence Unit, Report Summary, accessible at http://www.economistinsights.com/business-strategy/analysis/road-principles-practice. In a late 2014 survey of some 850 senior corporate executives, the Economist found that companies "overwhelmingly perceive a responsibility to protect human rights." Over 80% of execs surveyed agreed that business is "an important player in respecting human rights."

[3] Resolution 26/22, Human rights and transnational enterprises and other business enterprises, UN Doc. A/HRC/26/22, 15 July 2014, par. 3.

This Paper is not the place to recount the long and tortuous history of debates in the UN over business and human rights, going back at least to the 1970s.[4] We focus here on only the latest chapter of that history, beginning a little more than a decade ago.

A. UN Mandate of John Ruggie on Business and Human Rights

In 2005 the UN Commission on Human Rights (later reconstituted as the Human Rights Council) asked UN Secretary-General Kofi Annan to appoint a special representative on the issue of "human rights and transnational corporations and other business enterprises."[5] Annan appointed Harvard University political scientist John Ruggie. The focus of Ruggie's mandate, and of business and human rights discourse, has paid special (but not exclusive) attention to the role of transnational businesses and their investments and operations in host States – addressing issues of the impact of such companies in operations outside of their home jurisdictions.

Ruggie's initial mandate was, among other things, to "identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;" and to "elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation." [6]

Ruggie's appointment flowed from a decision of the UN Human Rights Council not to adopt an earlier instrument that attempted to define the legal responsibilities of corporations with respect to human rights. The draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" were approved in 2003 by the United Nations Sub-Commission on the Promotion and Protection of Human Rights. The Norms applied a long list of treaties and international instruments to transnational corporations.[7] Critics of the Norms, among other objections, viewed them as too prescriptive.[8]

While non-binding, the Draft Norms were crafted with the aspiration to extend human rights obligations to companies as well as states. The preamble recognized that even though States have the "primary responsibility" to protect human rights, "transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights." The draft Norms also stated as an objective that every effort should be made that the norms be "generally known and respected."

The draft Norms were considered by the UN Commission on Human Rights in 2004. The Commission "express[ed] its appreciation to the Sub-Commission for the work it has undertaken in preparing the draft norms" and said they contained "useful elements and ideas for consideration." But it did not approve them and said they had "no legal standing."[9] Special Representative of the Secretary-General ("SRSG") Ruggie was then appointed so that the UN could undertake a more systematic study of the issue of human rights and transnational corporations and other business enterprises.

B. UN Framework on Business and Human Rights: "Protect, Respect, Remedy"

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[4] See the helpful summary in John Ruggie, Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors, Sept. 9, 2014, Institute for Human Rights and Business, accessible at http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html.

[5] UN Commission on Human Rights, res. 2005/69, Human rights and transnational corporations and other business enterprises, 20 April 2005.

[6] Id.

[7] **Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12 (2003).**

[8] For a summary critique, see John Ruggie, Interim Report, UN Doc. E/CN.4/2006/97, Feb. 2006, pars. 56-69.

[9] UN Commission on Human Rights, Decision 2004/116, 20 April 2004.

After extensive studies and consultations with diverse stakeholders worldwide, in 2008 Ruggie recommended a three-part "Framework" on business and human rights: "Protect, Respect and Remedy."[10] In summary, the Framework "comprises three core principles:"

- "the State duty to protect against human rights abuses by third parties, including business;"
- "the corporate responsibility to respect human rights; and"
- "the need for more effective access to remedies."

"The three principles form a complementary whole in that each supports the others in achieving sustainable progress."[11]

Ruggie explained:

> "Business is the major source of investment and job creation, and markets can be highly efficient means for allocating scarce resources. They constitute powerful forces capable of generating economic growth, reducing poverty, and increasing demand for the rule of law, thereby contributing to the realization of a broad spectrum of human rights. But markets work optimally only if they are embedded within rules, customs and institutions. Markets themselves require these to survive and thrive, while society needs them to manage the adverse effects of market dynamics and produce the public goods that markets undersupply. ..."[12]

Ruggie identified the "root cause" of contemporary problems involving business and human rights as "governance gaps":

> "governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge."[13]

The three-part Framework was Ruggie's response to those governance gaps. Under existing international human rights law, he noted, States have the legal duty to protect persons within their jurisdiction from human rights violations, including those committed by business[14] (or in which business is complicit[15]). This has come to be known as "Pillar One" of the three-part Framework.

What is now called "Pillar Two" of the Framework is the business responsibility to respect human rights. Ruggie articulated the general business "responsibility to respect," not as a new international legal obligation, but as a duty assumed "because it is the basic expectation society has of business."[16] It is "part of what is sometimes called a company's social license to operate."[17]

Ruggie noted that international organizations such as the International Labour Organization and the Organization for Economic Cooperation and Development, as well as major business organizations, and the thousands

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[10] John Ruggie, Protect, Respect and Remedy: a Framework for Business and Human Rights, UN Doc. A/HRC/8/5, 7 April 2008.
[11] Id. at 1 (emphasis added).
[12] Id., p. 3 par. 2.
[13] Id., p. 3 par. 3.
[14] Id., pp. 7-8, pars. 18-22.
[15] Id., pp. 20-21, pars. 73-81.
[16] Id., pp. 4-5, par. 9.
[17] Id., pp. 16-17, par. 54.

of individual companies that have joined the UN Global Compact, recognize that business has a responsibility to respect human rights.[18]

What does the business responsibility to respect human rights mean? In essence it has two components. The first is a negative obligation: "To respect rights essentially means not to infringe on the rights of others - put simply, to do no harm."[19]

The second is a positive responsibility: "What is required is due diligence - a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it, mitigating it and providing remediation in the event harm occurs. The scope of human rights-related due diligence is determined by the context in which a company is operating, its activities, and the relationships associated with those activities."[20]

These dual responsibilities apply to all human rights as enumerated in a core set of human rights treaties: "Because companies can affect virtually all internationally recognized rights, they should consider the responsibility to respect in relation to all such rights, although some may require greater attention in particular contexts."[21]

Finally, meeting these two responsibilities is not always enough: "There are situations in which companies may have additional responsibilities - for example, where they perform certain public functions, or because they have undertaken additional commitments voluntarily. But the responsibility to respect is the baseline expectation for all companies in all situations."[22]

The Third Pillar of the Framework requires a remedy for victims when human rights violations occur. States have a responsibility to provide both judicial and non-judicial remedies, while business has a responsibility to provide non-judicial remedies for violations in which it is involved.[23]

By consensus, the UN Human Rights Council formally "welcome[d]" Ruggie's three-part Framework and recognized the "need to operationalize" it. Extending his mandate for three years, the Council asked him to elaborate on the Framework, and encouraged governments, business and civil society to cooperate with him.[24]

C. UN Guiding Principles on Business and Human Rights

After further research and consultations, Ruggie in 2011 presented a set of some 31 "Guiding Principles on Business and Human Rights," together with commentaries on each Principle.[25] Principles 1-10 cover the State duty to protect; Principles 11-24 detail the business responsibility to respect; and Principles 25-31 address the need to provide victims access to effective remedies. Noting the "painfully slow" nature of treaty negotiations, Ruggie stated that he had considered and ruled out the treaty option "at this time" (in order to focus initially on what he viewed as a more

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[18] Id., p. 8 par. 23.
[19] Id., p. 9 par. 24.
[20] Id., p. 9 par. 25.
[21] Id., p. 9, par. 24. The UN Guiding Principles on Business and Human Rights, later drafted by Ruggie and endorsed by the Human Rights Council in 2011, specifically identify, as a minimum set of human rights instruments to be respected by business in all contexts, the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the International Labour Organization's Declaration of Fundamental Principles and Rights at Work. Guiding Principle 12, in Guiding Principles, note 25 below. See generally section V.B below.
[22] Id.
[23] Id., p. 24 et seq.
[24] UN Human Rights Council, res. 8/7, Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 18 June 2008.
[25] John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. A/HRC/17/31, 21 March 2011.

timely means to close the governance gap and to provide victims access to a remedy sooner rather than later.[26] (Ruggie's position, as discussed below, has evolved since then.)

The UN Human Rights Council, again by consensus, formally "endorse[d]" the Guiding Principles,[27] now known as the "UN Guiding Principles." In addition to the ongoing mandate of the UN High Commissioner for Human Rights, the Council established a Working Group of five independent experts to monitor and promote effective implementation of the Guiding Principles.[28] It also established an annual Forum on Business and Human Rights, under the guidance of the Working Group, to facilitate dialogue and exchange on implementation of the Guiding Principles, as well as on issues of business and human rights generally.[29] The Council also made clear that its endorsement of the Guiding Principles by no means closed the door on further initiatives.[30]

Assisted by the Office of the UN High Commissioner for Human Rights, the expert Working Group has since 2011 conducted studies and consultations, and issued reports and recommendations.[31] The Working Group has particularly encouraged States to adopt National Action Plans to implement the Guiding Principles. It has published a set of guidelines, both for the content of plans and for the process by which plans are adopted.[32] Beginning in 2013, several States have adopted National Action Plans, and a dozen or so additional national plans are currently in preparation (including in the US).[33] The UN Guiding Principles emphasize that States have a critical role to play and can use a "smart mix" of measures – national and international, mandatory and voluntary – to foster business respect for human rights.[34] Companies, too, have made progress in adopting human rights policies, strengthening due diligence processes, and in other aspects of implementing the Guiding Principles.[35] The legal profession has also been active in promoting the Guiding Principles.[36]

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[26] John Ruggie, Treaty road not travelled, ETHICAL CORPORATION, May 2008, pp. 42-43. Ruggie also argued that a treaty-making process "now" could undermine "effective shorter-term measures," and noted "serious questions" about how a treaty would be enforced. Id. at 42.

[27] UN Human Rights Council, res. 17/4, Human Rights and transnational corporations and other business enterprises, 16 June 2011, UN Doc. A/HRC/RES/17/4, 6 July 2011, par. 1.

[28] Id., par. 6.

[29] Id., par. 12.

[30] As aptly summarized by the International Commission of Jurists, the Resolution "notes that the Guiding Principles were adopted without prejudice to 'any future initiatives, such as a relevant, comprehensive international framework'. [The Resolution] also states that adoption of the Guiding Principles did 'not foreclose any other long-term development, including further enhancement of standards' ….. and requested the new Working Group … to: 'continue to explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies ...'" International Commission of Jurists, Needs and Options for a New International Instrument in the Field of Business and Human Rights, June 2014 (hereafter "ICJ Report"), p. 5.

[31] See generally its web page at http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx.

[32] UN Working Group on Business and Human Rights, Guidance on National Action Plans on Business and Human Rights, Version 1.01, December 2014, accessible at http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf.

[33] See listing at http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlan...aspx.

[34] UN Guiding Principles, note 25 above at ¶3.

[35] See generally, e.g., World Business Council on Social Development, Scaling Up Action on Human Rights: Operationalizing the UN Guiding Principles on Business and Human Rights (2014), accessible at http://www.wbcsd.org/Pages/EDocument/EDocumentDetails.aspx?ID=16382&NoSearchContextKey=true. Thirty-four of the world's largest 50 companies now have a publicly available statement on human rights. Business and Human Rights Resource Centre, LAUNCH: Corporate & Government Action on Human Rights Revealed, Feb. 25, 2015, accessible at http://business-humanrights.org/en/launch-corporate-government-action-on-human-rights-revealed?utm_source=Business+%26+human+rights+-+Weekly+Update&utm_campaign=df1a8c93f3-Weekly_Update_25_February_20152_24_2015&utm_medium=email&utm_term=0_3a0b8cd0d0-df1a8c93f3-174128041. The first reporting framework specifically on the Guiding Principles has

D. Debate Over a Treaty on Business and Human Rights

Frustration, however, remains. Many human rights groups report that, on the ground, not much has improved since the adoption of the Guiding Principles.[37] And there is widespread recognition that Pillar Three of the Guiding Principles – access to effective judicial and non-judicial remedies – does not seem to have made meaningful progress. Daunting legal and practical obstacles continue to thwart access to justice for parties adversely affected by corporate involvement in human rights abuses, especially in the transnational context.[38] Indeed, in some respects, notably in the United States and the United Kingdom, access to judicial remedies for human rights violations involving business has actually been limited since the adoption of the Guiding Principles.[39]

By 2013 a debate was well underway among governments and within the human rights community.[40] Some argued that the Guiding Principles were still quite new and growing in impact, and that all stakeholders needed more time to implement them more fully. Others contended that the Guiding Principles were in any event too weak to overcome what they perceived as business resistance to accountability, and that more time would only prolong their ineffectiveness. In their view, a more effective, "hard law" tool was needed.

In September 2013 Ecuador, claiming the support of some 85 countries, urged the UN Human Rights Council to take up the issue of a legally binding treaty on business and human rights.[41] In November 2013, civil society groups meeting in Bangkok, Thailand issued a Joint Statement echoing the call.[42] More than 600 civil society groups have now reportedly joined the call for a legally binding treaty.[43]

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recently been introduced. Shift and Mazars, UN Guiding Principles Reporting Framework, First Comprehensive Guidance for Companies on Human Rights Reporting Launches in London, Feb. 24, 2015, accessible at http://www.ungpreporting.org/wp-content/uploads/2015/02/UNGPRF_launchPR_20Feb20151.pdf.

[36] See section V.G below.

[37] See., e.g., closing remarks of Audrey Gaughran of Amnesty International in the UN Forum on Business and Human Rights, Dec. 3, 2014, video accessible at http://webtv.un.org/meetings-events/human-rights-council/forum-on-business-and-human-rights/watch/closing-conversation-strategic-paths-forward-forum-on-business-and-human-rights-2014/3925402001001.

[38] See generally, e.g., Jennifer Zerk, Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies (2014) accessible at http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf; G. Skinner, R. McCorquodale and O. De Schutter, The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business (2013). The Office of the High Commissioner for Human Rights has commenced a large work plan focused on the access to remedy for gross human rights abuses – See http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx.

[39] In the United States, the Supreme Court in 2013 ruled that overseas human rights violations may not be litigated in federal courts under the Alien Tort Statute except where they sufficiently "touch and concern" the US. Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659 (2013). Cutbacks in UK legal aid funding likewise threaten the ability of British law firms to pursue overseas human rights violations. See Michael Goldhaber, Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard, 3 UC IRVINE L REV 127, 133-34 (2013).

[40] For a wide-ranging analysis of whether a treaty is needed, see ICJ Report, note 30 above, especially pp. 15-33.

[41] Business & Human Rights Resource Centre, Calls for a binding treaty on business and human rights – perspectives, 6 Dec. 2013, accessible at http://business-humanrights.org/en/calls-for-a-binding-treaty-on-business-human-rights-perspectives.

[42] People's Forum on Human Rights and Business, Bangkok, Nov 5-7, 2013, Joint Statement: Call for an international legally binding instrument on human rights, transnational corporations and other business enterprises.

[43] FIDH and ESCR-Net New Joint "Treaty Initiative," Jan. 30, 2015, accessible at https://www.fidh.org/International-Federation-for-Human-Rights/globalisation-human-rights/business-and-human-rights/16868-fidh-and-escr-net-new-joint-treaty-initiative.

In June 2014, as noted above, the UN Human Rights Council decided to establish an Intergovernmental Working Group "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[44]

Led by Ecuador and South Africa, the initiative was supported by a plurality of only 20 of the 47 member States of the Council. Fourteen States opposed and thirteen abstained. There was a notable geopolitical and geo-economic pattern in the vote. All States voting in favor were from Africa or Asia, except for Cuba, Ecuador, Russia and Venezuela. The opposing States included all European States on the Council (except Russia), plus the US, UK, Japan and the Republic of Korea. The abstentions included four major Latin American economies (Argentina, Brazil, Mexico and Peru), three African States, three Gulf States and one Asian State.

Opposition by the US, UK and European Union States was intense. Not only did they vote against the resolution, they stated that they would refuse to participate in the Intergovernmental Working Group. The US objected on multiple grounds, arguing that:

- A treaty negotiating process "will unduly polarize these issues."
- States have not had enough time to implement the Guiding Principles, which have already made a meaningful difference, but which will now be undermined by this "competing initiative."
- A one-size-fits-all instrument is not the right approach to the complexities of regulating business.
- In contrast to the global applicability of the Guiding Principles, a treaty would bind only states that become party to it.
- An "intergovernmental" working group will not benefit from participation by key stakeholders, including business.
- There are practical questions about how an international binding instrument would apply to corporations, which, the US contended, are not subjects of international law; yet one of the sponsors proposes to impose legal obligations directly on businesses.
- The resolution seeks to regulate certain businesses and not others.[45]

This last objection – that the treaty might regulate some businesses and not others – refers to a footnote in the preamble to the resolution. The resolution proposes a treaty to regulate "transnational corporations and other business enterprises." Yet the preambular footnote explains that the phrase, "other business enterprises," denotes "all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law." This seems to exclude any business other than transnational corporations from the scope of any treaty. (This apparent narrowing of focus from the broader Guiding Principles will be further discussed in Part V below.)

That issue was among those addressed by John Ruggie in a September 2014 commentary. Cautioning against the legal and political difficulties inherent in negotiating a treaty on business and human rights, he urged the sponsors to pursue a treaty that would cover "other business enterprises" as well as transnational corporations; to appoint a prominent and consensus-seeking chair for the Intergovernmental Working Group; to ensure that the drafting process is broadly inclusive of outside voices, including business; to conduct basic legal research early in the process, including on

[44] UN HRC Res. 26/9, 26 June 2014, par. 9.

[45] Permanent Mission of the United States of America to the United Nations and Other International Organizations in Geneva, US Delegation to the UN HRC, Explanation of Vote, Proposed Working Group Would Undermine Efforts to Implement Guiding Principles on Business and Human Rights, June 26, 2014, accessible at https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/.

corporate law and international investment law; and to step up efforts to implement the UN Guiding Principles during the predictably lengthy period of treaty negotiations.[46] A variety of commentators have begun to argue about the merits of a treaty, with experts lining up on both sides of the debate.

In subsequent remarks at the UN Forum on Business and Human Rights in Geneva in December 2014, Ruggie noted that the politics of imposing treaty obligations on transnational corporations are becoming ever more challenging. He pointed out that transnational companies from the global South – from countries like Brazil, China, India and South Africa – have become the world's largest in industries like oil, electronics and beer. He reiterated his earlier calls that any treaty should focus on corporate involvement in "gross" human rights abuses.[47]

In that same Forum, Ecuador's newly named Ambassador to the UN in Geneva, María Fernanda Espinosa, announced that the first meeting of the Intergovernmental Working Group will take place in Geneva in July 2015. She stated further that civil society would be welcome to attend, that a treaty should not be limited to transnational corporations, and that Ecuador and South Africa welcomed submissions beforehand from all interested parties.[48] In response to this and other statements, an EU representative seemed to leave open whether the EU might participate after all in the Intergovernmental Working Group.[49] It is unclear at this writing how the business community will participate in the negotiation process. It appears that a joint set of comments will soon be submitted to the UN by a coalition of global business organizations.[50]

E. Continued Implementation of UN Guiding Principles

Meanwhile, the process of implementing the UN Guiding Principles continues. In June 2014, one day after voting on the controversial resolution on a treaty, the Council adopted a second resolution by consensus.[51] This resolution:

- Extends the mandate of the expert Working Group,
- Urges States to adopt National Action Plans or similar frameworks,

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[46] John Ruggie, Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors, Sept. 9, 2014, Institute for Human Rights and Business, accessible at http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html.

[47] John Ruggie, Closing Plenary Remarks, Dec. 3, 2014, Third UN Forum on Business and Human Rights, accessible at http://www.ohchr.org/Documents/Issues/Business/ForumSession3/Submissions/JohnRuggie_SR_SG_BHR.pdf.

[48] Personal notes of one of the present authors, who attended the presentation by Ambassador Espinosa.

[49] Id.

[50] On May 4, 2015, the International Organization of Employers ("IOE") circulated to other business groups for comment a draft set of observations on the treaty process, proposed to be submitted by the IOE, together with the Business & Industry Advisory Committee to the OECD, International Chamber of Commerce, International Petroleum Industry Environmental Conservation Association, and the World Business Council for Sustainable Development. Posted excerpts from their initial draft stated that "the UN treaty process must not undermine the ongoing implementation of the UN Guiding Principles...The UN treaty process should address all companies, not only multinationals...A potential UN treaty process should build on the UN "protect – respect - remedy" framework...The UN treaty process should be inclusive..." (Accessible at http://business-humanrights.org/en/business-organizations-call-for-comments-on-draft-observations-on-un-business-human-rights-treaty-process-22-may.)

[51] UN Human Rights Council, res. 26/L.1, Human rights and transnational enterprises and other business enterprises, 23 June 2014, UN Doc. A/HRC/26/L.1. A revised, final version of this text was adopted as Resolution 26/22, Human rights and transnational enterprises and other business enterprises, UN Doc. A/HRC/26/22, 15 July 2014. Quotations in the text above are from the final version.

- Calls upon "all business enterprises to meet their responsibility to respect human rights in accordance with the Guiding Principles,"

- Asks the UN High Commissioner on Human Rights to continue "work to facilitate the sharing and exploration of the full range of legal options and practical measures to improve access to remedy for victims of business-related human rights abuses, in collaboration with the Working Group," and

- Continues the annual Forum on Business and Human Rights.[52]

In 2013 the United Kingdom became the first country to publish a National Action Plan.[53] One year later President Obama announced that the United States would launch a process to develop a National Action Plan for responsible business conduct, consistent with the UN Guiding Principles and other international instruments.[54] The US process is underway during 2015, with various stakeholder forums being held throughout the country.[55] The US initiative addresses not only human rights, but such other issues as anti-corruption and financial transparency.

This, then, is the state of play as we write this analysis of treaty issues and options in May 2015.

III. EXISTING INTERNATIONAL LEGAL OBLIGATIONS OF BUSINESS WITH RESPECT TO HUMAN RIGHTS

At present there is no comprehensive global treaty on business and human rights. Nor do the UN Guiding Principles impose new or additional obligations under international law.[56]

That does not mean that there are no current international laws imposing human rights obligations on business corporations or business executives. Such laws exist. But their coverage is scattered, often indirect, and incomplete.[57]

Before illustrating such laws, it bears mentioning that the modern human rights project, while State-centered, has never been exclusively so. The foundational document of international human rights law is the 1948 Universal Declaration of Human Rights. Its prefatory clause proclaims the Declaration as a "common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, ..." (Emphasis added.)

Business corporations are, of course, among the "organs of society" thus exhorted, not only to respect human rights, but also to promote respect for human rights and by progressive measures to secure their effective observance.

But the prefatory clause of a General Assembly Declaration is not law. What international legal obligations do business corporations and their executives have to respect human rights?

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[52] The annual Forum on Business and Human Rights is scheduled to take place in Geneva November 16-18, 2015.
[53] HM Government, Good Business: Implementing the UN Guiding Principles on Business and Human Rights, Cm 8695, Sept. 2013.
[54] White House, Office of the Press Secretary: Factsheet announcing National Action Plan, Sept. 24, 2014.
[55] See generally http://www.humanrights.gov/dyn/2015/usg-national-action-plan-on-responsible-business-conduct/.
[56] "The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; ..." Introduction to the Guiding Principles, UN Doc. A/HRC/17/31, par. 14. "Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights." Guiding Principles, General Principles (preceding Guiding Principle 1).
[57] See generally ICJ Report, note 30 above, pp. 9-33.

Most of these obligations are indirect: international law obligates States to use their domestic laws and institutions to protect the human rights of persons within their jurisdiction, including from violations by third parties.[58] States must require third parties, including business, to refrain from harming people. In some instances State obligations to safeguard human rights also obligate States to require business to take positive steps to protect rights, whether by properly training private security forces, providing safe factories and workplaces, or paying workers a minimum wage.

These State duties derive in part from general human rights treaties joined by States. In the words of Pillar One of the Guiding Principles, existing international law imposes on States a "duty to protect" persons within their jurisdiction from human rights violations committed by business. Wide-ranging global and regional human rights treaties require States Parties to "ensure,"[59] "secure,"[60] or "recognize" human rights,[61] and to take measures to give effect to the rights.[62] These commitments require States to take reasonable measures to prevent human rights violations, by granting State institutions the necessary powers and by using "all those means of a legal, political, administrative and cultural nature" necessary to prevent violations; to investigate, prosecute, punish, and provide reparations for violations; and, where possible, to restore rights that have been violated.[63]

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[58] See generally, e.g., Jean-Francois Akandji-Combe, Positive Obligations under the European Convention on Human Rights, Human Rights Handbooks, No. 7, Council of Europe (2007), especially pp. 14-16; Eric Engle, Third Party Effect of Fundamental Rights (Drittwirkung), 5 HANSE LAW REV. 165 (2009).

[59] International Covenant on Civil and Political Rights, 16 Dec. 1966, entered into force, 23 March 1976, 999 U.N.T.S. 171, [hereafter "ICPR"], art. 2.2; American Convention on Human Rights, 22 Nov. 1969, entered into force, 18 July 1978, OAS Treaty B-32, art. 1.1.

[60] [European] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, entered into force, 3 Sept. 1953, ETS No. 005, art. 1.

[61] African Charter on Human and Peoples' Rights, 27 June 1981, entered into effect, 21 Oct. 1986, art. 1.

[62] ICPR, art. 2.2 ("Where not already provided for by existing legislative or other measures, each State Party ... undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights ...."); American Convention, art. 2: ("Where the exercise of any of the rights or freedoms ... is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."); African Charter, art. 1 (States shall recognize rights "and shall undertake to adopt legislative or other measures to give effect to them.")

[63] Int.Am. Ct. H. Rts., Velásquez Rodríguez v. Honduras, Judgment of 29 July 1988, par. 166. To similar effect, see UN Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004); and African Comm'n Human & Peoples' Rts., Social and Economic Rts. Action Center v. Nigeria, Communication No. 155/96, pars. 43-48 (2001).

As broadly explained by the Inter-American Court in Velásquez Rodríguez, the State duty to ensure rights "implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. ... [T]he States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation."

Furthermore: "The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation." (Par. 174.) "This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages." (Par. 175.)

In addition, International Labour Organisation ("ILO") treaties require States to legislate and enforce minimum wages, maximum hours, safe working conditions, freedom of association, and so on. While these laws are formally directed at States, the real objects of regulation, albeit indirectly, are business corporations.

For several reasons, these existing international laws are not adequate to ensure business respect for human rights. Not all general human rights or ILO treaties are universally ratified; these treaties simply do not bind some States. While general human rights treaties impose obligations on States, they lack specificity as to the scope of the duties States must impose on companies. In contrast, ILO treaties are specific, but limited in scope to particular labor rights and violations.

And in any case, States may lack the will or capacity to carry out even those specific commitments by which they have agreed to be bound. Many of these treaties lack any mechanism to require a State to live up to its commitments, outside of public reporting of State performance to a United Nations or relevant international body. For all these reasons, business may avoid accountability because States have not fully implemented their own duties with respect to human rights. Transnational businesses may also have different obligations depending on where they operate – at times working in States that do not have the will or ability to fulfill treaty commitments.

Another category of international laws bearing on business and human rights is international criminal law for heinous offenses such as genocide,[64] war crimes,[65] crimes against humanity,[66] slavery or forced labor,[67] human trafficking,[68] and sexual exploitation of children,[69] all of which in certain circumstances can be committed by non-State actors. Several international treaties explicitly require States to impose legal liability on "legal persons," such as business corporations, for involvement in international crimes.[70]

However, these "worst of the worst" human rights violations are limited to the most purposeful and gross violations of human rights. A gold mine or oil pipeline that poisons the local water supply, for example, may violate the human rights to life, health and clean water, but absent proof of malicious intent – a difficult element to prove in any case – would not likely rise to the level of one of these "gross" and criminal violations. Some states have domestic criminal legislation that theoretically permits the prosecution of legal persons for international crimes. This has arisen in part because States that are party to the Rome Statute of the International Criminal Court agreed to amend their own criminal laws to allow for prosecutions at the domestic level. A number of these jurisdictions allow for prosecution of corporations as well as natural persons.[71]

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[64] See section IV.B (5) below.

[65] Id.

[66] Id.

[67] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 Sept. 1956, entered into force, 30 April 1957, 266 U.N.T.S. 3.

[68] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, 2237 U.N.T.S. 319, entered into force, 25 December 2003 (166 States Parties as of Feb. 15, 2015).

[69] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 25 May 2000, entered into force, 18 Jan. 2002, 2171 U.N.T.S. 227.

[70] International Convention for the Suppression of Financing of Terrorism, 9 Dec. 1999, entered into force, 10 April 2002, 2178 U.N.T.S. 197, art. 5.1. To similar effect are the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, entered into force, Jan. 18, 2002, 2171 U.N.T.S. 227, art. 3.4; Convention Against Transnational Organized Crime, Nov. 15, 2000, entered into force, Sept. 29, 2003, 2225 U.N.T.S. 209, Art. 10; Convention Against Corruption, 31 Oct. 2003, entered into force, 14 Dec. 2005 , 2349 U.N.T.S. 41, art. 26; Organization for Economic Cooperation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, DAFFE/IME/BR(97)20, entered into force, Feb. 15, 1999, art. 2.

[71] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Business and human rights: mapping international standards of responsibility and accountability for corporate acts, UN Human Rights Council, UN Doc./HRC/4/35, 19 February

A new Protocol to the African Court of Justice and Human Rights broadens the list of international crimes which corporations might commit, and makes clear that corporations can be criminally liable for these crimes. (See section IV.B (5) below.) But this Protocol has not yet entered into force, its application is untested, and in any event it will apply only in Africa.

Existing international law, then, is uneven and extremely limited in practice in its application to business violations of human rights. Nonetheless, it demonstrates that there is no blanket jurisprudential impediment to using international treaty law to protect human rights from violations or complicity by business. This is true whether the international law is applied indirectly through States, or directly to business executives or, where national laws permit,[72] directly to business corporations.[73]

IV. TREATY OPTIONS

At this early stage there is a wide range of possibilities for the form and content of a possible treaty on business and human rights. The mandate of the Inter-Governmental Working Group is no more specific than "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[74]

The negotiation process could lead to an instrument ranging from a comparatively weak or minimalist treaty, one that would simply mandate public reporting on human rights by large public companies (as recently required in Europe by the European Union as part of its non-financial reporting rules),[75] to a strong treaty that provides for both civil and criminal remedies, in both national and international courts, for human rights violations committed by corporations.

The global coalition of NGO's calling for a treaty, as well as the lead governmental sponsor (Ecuador), advocate a treaty that comes closer to the "hard" end of the spectrum. The November 2013 NGO Joint Statement calls for a treaty that, among other things, requires States Parties to provide for:

> "c) … legal liability for business enterprises for acts or omissions that infringe human rights;" [and]
>
> "d) … access to an effective remedy by any State concerned, including access to justice for foreign victims that suffered harm from acts or omissions of a business enterprise in situations where there are bases for the States involved to exercise their territorial or extraterritorial protect- obligations."[76] (emphasis added)

In addition, the NGO's call for a treaty that "[p]rovides for an international monitoring and accountability mechanism."[77]

Similarly, Ecuador's Foreign Minister has written that the proposed treaty "would move the world to a legal framework that holds transnational corporations accountable for their human rights violations. It will provide legal

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2007, ¶24-25; see also Anita Ramasastry and Robert C. Thompson, Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries (Fafo 2006).

[72] See section IV.A (5) below.

[73] See section V.F below.

[74] UN HRC Res. 26/9, 26 June 2014, par. 9.

[75] Council of the European Union, Press Release, New transparency rules on social responsibility for big companies, Sept. 29, 2014. The new rules will apply only to large public-interest companies with more than 500 employees and a balance sheet of $25.3 million and higher, or a net turnover of $50.7 million or more.

[76] People's Forum on Human Rights and Business, Bangkok, Nov.5-7, 2013, Joint Statement: Call for an international legally binding instrument on human rights, transnational corporations and other business enterprises, Par. 1 (c) and (d).

[77] Id., par. 1 (e).

protections and effective remedies, as well as create an important role for civil society actors in promoting corporate accountability …"[78]

On the other hand, it is by no means clear that any treaty that ultimately emerges from a UN drafting process will meet these objectives. In between the extremes of a strong treaty and no treaty, there is a wide range of possible outcomes of a drafting process. There is also the possibility that there might be more than one treaty, or that a treaty or treaties would address specific sectors.[79]

In this section we do not attempt to catalogue them all; there are simply too many options. Instead we merely outline illustrative options, each modeled partly on existing global or regional instruments binding States in regard to human rights or related fields, such as anti-corruption and environmental law.[80] Each of these potential templates is either widely ratified or recently adopted. Thus there is reason to believe that their form, at least, may be generally acceptable to States.

In all these examples, references to "corporations" or "companies" refer to "transnational corporations and other business enterprises," the phrase used in all the Human Rights Council resolutions of the last decade relating to business and human rights. Key conceptual issues that arise from the various treaty options, including from this very phrase, are addressed in section V, following the catalogue of illustrative treaty options in this Part IV.

A treaty specifying business responsibilities could either be a new, freestanding instrument, or might be crafted as an additional protocol to an existing treaty imposing human rights obligations on States.

For clarity, our listing is organized in two broad categories: treaties mandating mainly national action (Part A below); and treaties establishing international enforcement machinery (Part B below).[81] (A treaty could of course mandate both.) Within each category, the listing proceeds, roughly speaking, from relatively "weak" to relatively "hard" treaty options.

A third category involves "policy coherence" treaties, by which States would review and amend their laws and international agreements concerning business to ensure consistency with the State duty to protect human rights (Part C below). A final category refers to treaties for particular business sectors or for certain kinds of human rights violations (Part D below).

Finally, it should be noted that nothing in the UN treaty process precludes States or regional organizations from proceeding with national or regional laws, treaties and other initiatives on business and human rights.

A. National Action Treaties:

1. Business Reporting:

A treaty might simply require all or some corporations to report publicly on their human rights policies, risks, outcomes and indicators, perhaps using the "comply or explain" approach of some recent reporting regulations. For example, in October 2014 the European Union issued a Directive requiring some 6000 "public interest" companies in

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[78] Ricardo Patiño, Transnational Misconduct Must End, HUFFINGTON POST, Oct. 24, 2014, accessible at http://www.huffingtonpost.co.uk/ricardo-patino/ecuador-ricardo-patino_b_6040920.html

[79] The Human Rights Council Resolution establishes the Intergovernmental Working Group on "a" legally binding instrument, for the purpose of elaborating "an" international legally binding instrument. UN HRC Res. 26/9, 26 June 2014, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, par. 1. Hence it appears that further HRC authority might be needed for the Working Group to elaborate more than one treaty.

[80] For further analysis, see ICJ Report, note 30 above, pp. 34-43.

[81] The NGO Joint Statement on a treaty specifically calls on States to "monitor and regulate" business enterprises and to provide for their "legal liability" and for an "effective remedy," but only generally calls for an undefined "international monitoring and accountability mechanism." Joint Statement, note 42 above.

the EU, having more than 500 employees and a balance sheet of $25.3 million and higher, or a net turnover of $50.7 million or more annually, to disclose certain "non-financial and diversity information." Public interest companies are publicly listed companies of "significant public relevance" because of the nature of their business, size or corporate status.[82]

Under these new rules, large public companies will have to report certain non-financial information: "as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters." Companies can avoid reporting on one or more of these issues if they do not pursue policies on those issues and provide a "clear and reasoned" explanation of this choice.

In addition to a brief description of their business models, companies will generally be required to report on:

- Policies and Processes: their policies regarding human rights (and related matters), including their due diligence processes;
- Outcomes: the outcomes of their policies;
- Risks: "the principal risks related to those matters linked to the group's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the group manages those risks;" and
- Indicators: key human rights (and related) "performance indicators" relevant to the company's business.[83]

EU member States will be allowed two years to incorporate the requirements of the Directive into their domestic laws. The methods of enforcement of the EU reporting obligations and independent verification of corporate reports are left to member State discretion. As is often true of EU directives, this may create inconsistencies in the application of these rules, and possibly a lack of "teeth" if companies fail to comply.

One approach to a UN treaty would be to adopt this existing EU reporting requirement, or a similar one, for States worldwide which choose to join the UN treaty, either as the entire UN treaty or as a component of a broader UN treaty.

One advantage of such an approach is that the 28 EU member States, already bound by the reporting requirement, and perhaps the current six EU candidate countries, might readily join a UN treaty obligating them to do what they are already bound to do. This might encourage wider ratification of the treaty by other States. A disadvantage, if the UN treaty were to go no further than a business-reporting requirement, is that it would not meet the stated objectives of the principal proponents of a treaty, in terms of access to effective remedy and corporate liability. It would still, however, facilitate a minimum baseline of information, providing potential transparency and access to information.

2. National Planning:

The UN Human Rights Council has encouraged all States to adopt National Action Plans to implement the UN Guiding Principles on Human Rights.[84] To date only a handful of States have done so, including the United Kingdom, although another dozen or more are currently in the process of developing Plans,[85] including the United States.[86] In

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[82] Council of the European Union, Press Release, New transparency rules on social responsibility for big companies, Sept. 29, 2014.

[83] Directive 2014/95 of the European Union Parliament and of the Council of 22 October 2014 amending Directive 2013/3/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, par. 3, adding new article 29a, accessible at http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1424037657022&uri=CELEX:32014L0095.

[84] UN Human Rights Council, Res. 26/22, June 27, 2014, par. 2.

[85] See listing at http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx.

addition, the UN Working Group on Business and Human Rights has published detailed guidance on both the content of National Action Plans and the process by which they should be developed.[87]

In view of the limited number of States that have initiated planning processes to date, one form of treaty might require all States Parties to do so, and encourage international cooperation in developing plans and sharing best practices. The treaty might even require States to adopt, or at least encourage them to take into account, some or all elements of the Working Group's Guidance on plans.[88] The Working Group's Guidance focuses on Pillar I and the State Duty to Protect, and provides a non-exhaustive list of issues that States should evaluate and act on – focusing on how States can use a smart mix of voluntary and regulatory measures to ensure that companies within their jurisdiction respect human rights, and also that victims have better access to remedies.[89] This might constitute either the entirety of a treaty, or one component of a broader treaty.

One advantage of such an approach would be to make clear that the treaty will reinforce, rather than detract from, implementation of the UN Guiding Principles. A disadvantage is that, by itself, it would not meet the objectives of the principal proponents of a treaty, since a focus on National Action Plans emphasizes national activity without international oversight or enforcement, as well as the potential for divergent approaches to what governments see as a common baseline for State action on business and human rights.

3. Business Implementation of Guiding Principles:

A treaty might mandate:

- States to carry out their duties under the UN Guiding Principles to "protect" human rights from violations by business or in which business is involved ("Pillar One" of the Guiding Principles), including with respect to extraterritorial operations of their businesses, to the extent jurisdictional bases exist under international law;[90]

- States to require all businesses, or all businesses above a certain size, to carry out their responsibility to "respect" human rights through adoption of human rights policies, due diligence processes, human rights conditions in their supply chain contracts, and remediation mechanisms ("Pillars One and Two" of the Guiding Principles); and

- States and business to address their judicial and non-judicial remediation responsibilities ("Pillar Three" of the Guiding Principles), either through taking certain specified measures, or through review processes designed to assure that victims have access to effective remedies.

An advantage of this approach is that it would encourage effective implementation of the UN Guiding Principles, whose basic content is already widely approved (albeit in "soft law" form). This approach is related to the National Action Plan option outlined above, but goes further in specifying the concrete actions that States must take to fulfill their treaty obligations. Implementation might be facilitated by templates for business reporting on

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[86] See US Dept. of State, USG National Action Plan on Responsible Business Conduct: Frequently Asked Questions, Feb. 12, 2015, accessible at http://www.humanrights.gov/dyn/2015/usg-national-action-plan-on-responsible-business-conduct/.

[87] UN Working Group on Business and Human Rights, Guidance on National Action Plans on Business and Human Rights, Version 1.01, December 2014, accessible at http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf.

[88] Id. at 17-36.

[89] Id. at 17-36.

[90] See section V.D below. The Commentary to Principle 2 of the UN Guiding Principles states: "At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis."

implementation of the Guiding Principles, such as the UN Guiding Principles Reporting Framework recently developed by Shift and Mazars for the Human Rights Reporting and Assurance Frameworks Initiative (RAFI).[91]

Some of the same challenges exist, however, as with the prior National Action Plan option. A difficulty is that much of the language of the Guiding Principles, and of their accompanying commentary, is purposefully vague and flexible. On some points, then, the treaty language would need either to be made more precise, thereby triggering more extended negotiations and perhaps ultimate rejection, or to be "soft," requiring States and business, for example, to "take into account" certain of their obligations and responsibilities, or to demonstrate that they have given them "due consideration," even while other obligations (especially State obligations under existing human rights treaties) might be clearly stated and mandated.

One possible approach for such a treaty would be for States Parties to adopt mandatory "due diligence" requirements for their companies in regard to their global supply chains, similar to the bill recently approved by the French National Assembly,[92] and as encouraged by a recent resolution of the European Parliament.[93] The French bill, which many observers expect to be enacted into law in 2015, would make "French companies employing 5,000 employees or more domestically or 10,000 employees or more internationally … responsible for developing and publishing due diligence plans for human rights, and environmental and social risks. Failure to do so could result in fines of up to 10 million euros."[94]

In a resolution adopted shortly after the French bill, the European Parliament "consider[ed] that new EU legislation is necessary to create a legal obligation of due diligence for EU companies outsourcing production to third countries, including measures to secure traceability and transparency, in line with the UN Guiding Principles on Business and Human Rights and the OECD MNE Guidelines."[95] Although this Resolution does not by itself mandate EU due diligence legislation, it may well lead to such legislation because the OECD Guidelines on Multinational Enterprises, discussed below, include a component on human rights due diligence.[96]

In Switzerland, a bill to mandate due diligence was narrowly defeated in Parliament, but an effort to mandate a binding public referendum is now underway.[97]

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[91] Accessible at http://www.shiftproject.org/project/human-rights-reporting-and-assurance-frameworks-initiative-rafi.

[92] National Assembly of France, Proposed Law, adopted text no. 501, 30 March 2015, accessible at http://www.assemblee-nationale.fr/14/ta/ta0501.asp.

[93] European Parliament resolution on the second anniversary of the Rana Plaza building collapse and progress of the Bangladesh Sustainability Compact (2015/2589(RSP)) 28 April 2015, accessible at http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=P8-RC-2015-0363&language=EN.

[94] Roel Nieuwenkamp, Legislation on responsible business conduct must reinforce the wheel, not reinvent it, 15 April 2015, accessible at http://oecdinsights.org/2015/04/15/legislation-on-responsible-business-conduct-must-reinforce-the-wheel-not-reinvent-it/. Mr. Nieuwenkamp is Chair of the OED Working Party on Responsible Business Conduct. (The quoted language in text above is from his commentary, not from the original French text of the bill.)

[95] European Parliament Resolution, note 93 above, par. 23.

[96] Arnaud Poitevin, The EU may move towards mandatory business & human rights regulation, May 9, 2015, accessible at http://business-humanrights.org/en/eu-parliamentary-motion-calls-for-mandatory-human-rights-due-diligence-for-companies?utm_source=Business+%26+human+rights+-+Weekly+Update&utm_campaign=f16079aed2-Weekly_Update_13_May_20155_12_2015&utm_medium=email&utm_term=0_3a0b8cd0d0-f16079aed2-174128041.

[97] The Swiss motion, proposing mandatory human rights and environmental due diligence for Swiss corporations, was defeated by a vote of 95-86. Nieuwenkamp, note 94 above. In response, the Swiss Coalition for Corporate Justice has begun collecting signatures for a popular initiative on the same topic. If they gather 100,000 signatures in 18 months, the measure will be put to a binding public referendum. http://www.corporatejustice.ch/en/.

If a treaty were to commit States Parties to require human rights due diligence for businesses, or even compliance with all three pillars of the Guiding Principles more generally, consideration might also be given to whether good faith, demonstrated compliance with the Guiding Principles (or due diligence) might be deemed a defense to, or at least a proportional mitigation of, criminal or civil liability. Such a provision could give business a strong incentive to comply with the Guiding Principles or to exercise due diligence, without depriving victims of a remedy for serious violations of human rights.

The US Federal Sentencing Guidelines provide a relevant example in the area of anti-corruption. Courts and the US Department of Justice take certain factors into consideration when assessing criminal fines for companies prosecuted under the U.S. Foreign Corrupt Practices Act:[98]

- whether high-level personnel were involved in or condoned the conduct,
- whether the organization had a pre-existing compliance and ethics program,
- voluntary disclosure,
- cooperation, and
- acceptance of responsibility.

United Kingdom anti-bribery law provides an example of due diligence as defense. The fact that companies took "adequate procedures" to prevent bribery in their operations is a defense to a charge of a company's failure to prevent bribery under the UK Bribery Act of 2010.[99]

Like the reporting and planning approaches outlined above, this approach to a treaty has the disadvantage that it does not meet all the objectives of the principal proponents of a treaty.[100] However, if suitable treaty language could be found, it might be acceptable to a broad range of States as a stand-alone treaty. Alternatively, it could be one component of a broader treaty.

4. Framework Treaty:

One way to implement the UN Guiding Principles (or other basic principles on business and human rights) could be a treaty designed to set in motion an ongoing process of review and elaboration of additional standards over time. That could be the result of initially adopting a generally worded, "framework" treaty, committing States Parties only to broad principles, later to be supplemented by more specified duties, through additional protocols or actions, based on review of state practice over time.

An example of such an approach is the universally ratified international legal regime on the ozone layer in the atmosphere.[101] The regime began with the 1985 Vienna Convention for the Protection of the Ozone Layer.[102] The initial commitments of States Parties were extremely general and flexible: "to take appropriate measures in accordance with the provisions of this Convention and of those protocols in force to which they are party," and to "[c]o-operate in the formulation of agreed measures, procedures and standards for the implementation of this Convention, with a view to the adoption of protocols and annexes …"[103]

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[98] US Sentencing Commission, US Sentencing Guidelines Chapter 8, Part B, e Remedying Harm from Criminal Conduct, and Effective Compliance and Ethics Program (1991).

[99] See Transparency International UK Adequate Procedures Guidance http://www.transparency.org.uk/our-work/business-integrity/bribery-act/adequate-procedures.

[100] But it may meet some objectives of some proponents. The Secretary General of Amnesty International recently wrote, "A treaty should require each state to pass laws to make corporate human rights due diligence mandatory, …" Salil Shetty, Corporations have rights. Now we need a global treaty on their responsibilities, GUARDIAN (UK), 22 January 2015.

[101] Both the Vienna Convention and the Montreal Protocol enjoy universal ratification (by 197 States Parties). See table at http://ozone.unep.org/new_site/en/treaty_ratification_status.php.

[102] Adopted 22 March 1985, entered into force, 22 Sept. 1988, 1513 U.N.T.S. 293.

[103] Vienna Convention, arts. 1 and 2.c.

As scientific analysis of ozone depletion progressed, the States Parties agreed to adopt more specific measures in the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer.[104] In addition, States included in the Montreal Protocol a "unique adjustment provision": Parties agreed to respond swiftly to new scientific information and to accelerate reductions of chemicals covered by the Convention as needed, by means of adjustments that would be "automatically applicable to all countries that ratified the Protocol." Since its initial adoption, the Montreal Protocol has thus been modified six times, without the need to adopt a new treaty or protocol on each occasion.[105]

The main advantage of initially adopting a "framework" treaty like the Vienna Convention for business and human rights is that it might swiftly secure broad agreement by States. Its general principles could be taken from the already widely supported UN Guiding Principles. More difficult or specific issues could then be deferred to future protocols, without holding up the entire negotiating process (possibly for years), or limiting the number of Parties to an eventual treaty to only the most supportive States. The European Convention on Human Rights, for example, has been supplemented with 15 additional protocols (plus two more that are pending ratifications), giving rise to new State obligations as consensus emerged on different human rights.[106]

Future protocols to a framework business and human rights treaty might provide for supplemental commitments which States will then be asked to ratify. The treaty might even provide for automatic adjustments, based on review of experience in implementing the framework principles, whenever agreement is reached by States Parties, as in the Montreal Protocol. (However, automatic adjustments of business responsibilities might not be as easily crafted or agreed as additional restrictions on chemicals affecting the ozone layer.)

The main disadvantage of such a "framework" approach is that it would not initially be likely to achieve what treaty proponents principally seek: legally enforceable corporate accountability, and access of victims to effective remedies. Proponents might well doubt whether, after adoption of a framework convention, any future protocols or adjustments would likely be adopted. On the other hand, early agreement on a framework treaty might create positive momentum that could ease the way for further negotiations on more challenging issues.

5. National Criminalization and International Cooperation:

A treaty might specify certain internationally recognized crimes against human rights, and require States to prosecute corporations and corporate executives and to cooperate with each other in doing so.

The form of such a treaty could be modeled on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,[107] which has been joined by all 34 OECD member States (including the US and the UK), as well as seven other States.[108] The Convention requires States to criminalize bribery of foreign public officials, as well as complicity in such bribery.[109] Where State legal systems do not permit criminal prosecutions of legal persons such as corporations, the Convention requires States Parties to "ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials."[110]

International cooperation in enforcement is required through mutual legal assistance, extradition, and cooperation on monitoring through the OECD Working Group on Bribery in International Business Transactions ("the OECD Working Group"), composed of experts of States Parties to the Convention.[111]

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[104] Adopted 16 Sept. 1987, entered into force, 1 Jan. 1989, 1522 U.N.T.S. 3.

[105] The foregoing information and quoted language are taken from the web site of the UN Environment Programme, Ozone Secretariat, http://ozone.unep.org/new_site/en/montreal_protocol.php (as of May 19, 2015).

[106] See table at http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG

[107] Signed 17 Sept. 1997, entered into force, 15 February 1999.

[108] See http://www.oecd.org/corruption/oecdantibriberyconvention.htm.

[109] Convention, arts. 1.1 and 1.2.

[110] Convention, art. 3.2.

[111] Convention, arts. 9, 10 and 12.

The OECD uses two tools -- monitoring and peer pressure – to ensure implementation and enforcement of the Convention. The OECD Working Group examines and evaluates through a rigorous monitoring mechanism a Party's efforts to live up to its anti-bribery obligations. After the initial assessment of a State's legislation for conformity with the Convention, the second phase of the monitoring process examines the structures in place to enforce the laws.[112]

The systematic examination and assessment of a State's performance by peers result in recommendations for concrete anti-bribery actions by the examined country. In addition, the Working Group, at its regular meetings, conducts a "tour de table" exercise as a unique mechanism to report about latest developments, both in legislation and in enforcement actions and to hold States responsible for reporting on their actions to their peers.[113]

A treaty on business and human rights could similarly require States to criminalize and cooperate in prosecuting corporations and corporate executives who commit or are complicit in such crimes against human rights as genocide, crimes against humanity, war crimes, torture, forced labor, and other defined international crimes[114] (human trafficking is already the subject of a similar convention).[115]

An advantage of this approach is that, in the corruption context, its form has already been accepted, not only by OECD States, but also by most States through the UN Convention against Corruption (see below). Nor, in a sense, would the substance be new: many international crimes against human rights are already defined by international law and widely recognized as such by States. In those two senses, there would be "nothing new" conceptually about such a treaty – even though, in practice, domestic criminalization by States of international human rights crimes is currently uneven, while criminal punishment of business involvement in such crimes is rare, as is the imposition of proportional civil sanctions against corporations.[116]

There are also disadvantages to the OECD model as a stand-alone approach. It would focus on negative sanctions as deterrents, rather than on more positive and broader forms of preventing human rights abuses. It would also be limited to serious human rights crimes (referred to by some as "gross" human rights abuses), rather than to the far broader range of human rights violations that are often important in the business context (e.g., routine labor rights violations such as wage theft or unpaid overtime, or failures by States to engage in processes to secure the free, prior, informed consent of indigenous communities about business projects affecting their lands).[117]

On the other hand, a treaty whose form is patterned on the OECD Convention need not be a stand-alone approach. It could be incorporated in a broader treaty. Indeed, in the corruption context, it already has been, as noted in the next section.

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[112] http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm

[113] OECD, "OECD Fights Foreign Bribery".

[114] John Ruggie recently suggested that "one obvious focus" for a treaty "would be the worst of the worst: business involvement in gross human rights abuses, such as genocide, extrajudicial killings, and slavery, as well as forced and bonded labor." J. Ruggie, Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors, Institute for Human Rights and Business, Sept. 9, 2014, note 17, accessible at http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html.

[115] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, 2237 U.N.T.S. 319, entered into force, 25 December 2003 (166 States Parties as of Feb. 15, 2015).

[116] See Anita Ramasastry and Robert C. Thompson, Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries (Fafo 2006) (uneven domestic incorporation); Int'l Corporate Accountability Roundtable, Commerce, Crime, and Human Rights: Closing the Prosecution Gaps, (businesses "rarely" held to account) accessible at http://icar.ngo/wp-content/uploads/2014/06/CCHR_Concept-Note-Commerce-Crime-and-Human-Rights.pdf

[117] E.g., United Nations Declaration on the Rights of Indigenous Peoples (2007), arts. 19, 29.2 and 32.2; International Labour Organisation Convention No. 169, Indigenous and Tribal Peoples Convention, 27 June 1989, entered into force, 5 Sept. 1991, arts. 6, 7.1, 15.2, 16.2, 17.2, 25.2, 27.1, 27.2, and 28.1.

6. National Prevention, Sanctions and International Cooperation:

The UN Convention against Corruption ("UNCAC"), adopted in 2003 and entered into force in 2005, now has 175 States Parties (including the US and the UK).[118] It not only incorporates the OECD approach described in the previous section, it also has extensive provisions requiring States to seek to prevent corruption through policies, practices, periodic review, establishment of independent prevention bodies, reporting and international collaboration.[119]

The form of UNCAC has thus met nearly universal acceptance by States. More than the text of the OECD Convention, the UN Convention takes both a preventive and a punitive approach. UNCAC requires the criminalization of foreign bribery.[120] Like the OECD Convention, it covers complicity as well as direct commission of crimes,[121] and requires States to "establish the liability" of corporations for offenses under the Convention, whether that be criminal or, in States whose legal systems do not permit criminal prosecution of legal persons, then "effective, proportionate and dissuasive" civil or administrative sanctions.[122] UNCAC also requires States to provide victims of corruption access to civil damages.[123]

UNCAC calls for peer review and also for monitoring of treaty implementation by an Assembly of States Parties.[124] These are not as robust, however, as in the OECD Convention. The OECD Convention serves as a good example of the possible benefits of civil society participation, as reports and recommendations are made public, and private sector and civil society play an active role throughout each review phase of the convention's monitoring mechanism.[125] UNCAC provides for periodic review, but allows States Parties to choose whether to disclose the findings of any evaluation as well as their own self-assessment.[126] An optional clause permits disputes between States over implementation of the UN Convention to be referred to the International Court of Justice.[127]

Given the broad acceptance of the UNCAC, one might anticipate broad acceptance of its form as a model for a treaty on business and human rights. Preventive aspects of such a treaty might incorporate reporting requirements and references to the UN Guiding Principles (as discussed above). Controversy might arise over which international crimes against human rights should be included in the treaty. Because this form of treaty relies heavily on State implementation – where the political will or capacity to regulate business interests is often lacking – proponents of a treaty on business and human rights might object to the lack of binding international enforcement institutions and procedures.

7. National Civil Remedies:

In addition to national criminal enforcement as discussed in the preceding two sections, a treaty could require States to provide civil damages remedies for victims of human rights violations committed by business or in which business is complicit. National civil damages remedies are mandated, not only by UNCAC (as noted in the preceding

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[118] Adopted 31 Oct. 2003, 2349 U.N.T.S. 41, entered into force, 14 Dec. 2005. See ratification table at http://www.unodc.org/unodc/en/treaties/CAC/signatories.html.

[119] Convention, arts. 5, 6, 10, 12 and 14.

[120] Convention, art. 16.

[121] Convention, art. 27.1.

[122] Convention, art. 26.

[123] Article 35 states: "Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation."

[124] Convention, art. 63.

[125] See Marie Chêne and Gillian Dell, U4 Expert Answer: Comparative Assessment of AntiCorruption Conventions' Review Mechanisms, 2 (2008), available at http://www.u4.no/helpdesk/helpdesk/query.cfm?id=163.

[126] Most governments have not made public their self-assessments, which provide the basis for the review, nor have most governments agreed to publish the full review report online. Only the executive summary must be published. UNCAC Article 13.

[127] Convention, art. 66.

section), but also, for example, by the UN Convention against Torture,[128] a treaty joined by 158 States Parties (including the US and the UK).[129] The Convention provides:

> "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. ..." (Art. 14.1.)

There would be important advantages in requiring a national civil damages remedy in a treaty. In principle, mandating national judicial (or non-judicial) damages remedies would be consistent with State obligations under Pillar Three of the Guiding Principles, while responding to demands of the main treaty proponents for remedies and accountability.

A bare mandate of civil remedies, however, is no guarantee that they will be effective. Experience has shown that theoretical access to justice (civil or criminal) is often thwarted in practice by legal barriers such as corporate veils and separate legal personality for parents and subsidiaries, limits on jurisdiction, and statutes of limitations, as well as practical barriers such as the high costs of litigation, the lack of legal aid or litigation funding for victims, and intimidation (or worse) of victims and witnesses.[130] Some (but only some) of these issues are explored in section V below. If a treaty mandating national civil damages remedies is to be effective in practice, some way to address many of these thorny issues will have to be considered, either by addressing them in the treaty text, or by creating some institution or process to address them in future implementation of the treaty.

8. Comprehensive National Protection:

As set forth in section III above, general human rights treaties impose wide-ranging duties on States to protect persons subject to their jurisdiction from human rights violations, including violations committed by third parties. A treaty on business and human rights could make explicit what is already implicit: that States must carry out those wide-ranging obligations specifically to protect people from human rights violations in which business is involved.

An advantage of this approach would be breadth of coverage. A disadvantage, however, is the vagueness and ambiguity of the language of general State obligations to "ensure" respect for human rights. There is an argument, then, for coupling any such broad language with more specific State or business obligations, ranging from reporting and planning to civil and criminal liability, as outlined in the preceding sections.

B. International Supervision Treaties:

1. State Reports to an International Body:

Twelve UN human rights treaties, several of which are widely ratified, as well as many ILO labor treaties, require States periodically to report on the progress they have made and obstacles they encounter in implementing their treaty obligations.[131] States submit written reports to committees consisting of experts, elected in their individual capacities by States Parties, to oversee treaty implementation. Civil society submits "shadow reports" and otherwise

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[128] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, entered into force, 26 June 1987, 1465 U.N.T.S. 85.

[129] See table at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en.

[130] See generally, e.g., Jennifer Zerk, Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies (2014) accessible at http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf; G. Skinner, R. McCorquodale and O. De Schutter, The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business (2013).

[131] E.g., ICPR, art. 40.1 (States Parties "undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights").

engages in the review process. The expert committees then conduct "constructive dialogue" with States in public hearings, after which they issue "concluding observations" expressing concerns and making recommendations.

The reporting process has been plagued by multiple, overlapping and burdensome State reporting obligations; State delays or failures to report; and, even so, delays and overwhelming burdens on UN treaty committees in reviewing reports.[132] On the other hand, the reporting process provides an opportunity for periodic self-assessment by States, with participation by civil society in a relatively transparent process, and accountability in the form of publicized critiques and recommendations by expert, collectively independent bodies.

On balance, State reporting might be deemed a useful component of a treaty on business and human rights. It could be combined with some requirement that States create and then implement National Action Plans as outlined in section IV.A.2 above. Reporting could relate to a State's own progress with respect to its plans, for example. Any reporting commitment would likely need to be harmonized with other UN treaty reporting procedures.[133]

[132] See generally, Navanethem Pillay, United Nations human rights treaty body system: A Report by the United Nations High Commissioner for Human Rights, June 2012, accessible at http://www.ohchr.org/EN/HRBodies/HRTD/Pages/TBStrengthening.aspx.

[133] See generally, e.g., UN G.A. Res. 68/268, Strengthening and enhancing the effective functioning of the human rights treaty body system, UN Doc. A/RES/68/268, 21 April 2014.

2. Individual Complaints to an International Treaty Body:

Optional clauses or protocols to at least eight core UN human rights treaties allow individuals to file complaints with the expert treaty bodies against States which agree to accept the procedure, once the complainants have exhausted domestic remedies or show good cause for failing to do so.[134] The number of States agreeing to individual complaint procedures, while often significant, is generally far fewer than the number of States Parties to the treaty. For example, whereas the International Covenant on Civil and Political Rights has 168 States Parties,[135] its First Optional Protocol, establishing its individual complaint procedure, has only 115 States Parties.[136]

The complaints are generally processed with little transparency, without independent investigations by the committees, and without public or evidentiary hearings. They result in "observations" from the treaty bodies which many States regard as not legally binding, and which often yield no or only partial compliance.

Nonetheless human rights NGOs have waged campaigns to establish individual complaint procedures for treaties that did not originally allow them. The written complaint procedure may be far less expensive than full-blown judicial litigation; it may result in published committee findings that place pressure on States to provide relief to the victim and not infrequently lead to a constructive response; it may develop jurisprudence; and it may be used to bring illustrative cases exemplifying broader patterns of abuse by States.

In negotiating situations where large numbers of States are willing to accept normative and reporting obligations, but only smaller numbers are willing to accept individual complaint procedures, the optional mechanism allows a way to maximize the number of States Parties to the main treaty, while also creating an individual complaints procedure for those States willing (now or in the future) to accept them.

Especially if States are resistant to a treaty requiring some form of complaints procedure resulting in legally binding rulings, as in adjudication, arbitration or administrative decision, a non-binding mechanism may be better than no individual complaint mechanism at all. It may also provide a way to overcome the barriers of expense and inequality of arms that may make adjudication or arbitration difficult for victims to pursue in practice.

A threshold question is whether such a procedure would allow individual complaints to be filed against States, companies, or both. The answer might depend on the nature of the underlying substantive obligations imposed by the treaty, and on whether they mandate conduct by States, companies, or both.[137]

OECD member States have already agreed to one form of complaint procedure, established as part of the OECD Guidelines for Multinational Enterprises.[138] The OECD Guidelines are recommendations from governments to multinational enterprises operating in or from countries that are signatory to the Declaration on International Investment and Multinational Enterprises including the Guidelines. The OECD Guidelines provide guidance for responsible business conduct in areas such as: labor rights, human rights, environment, combating bribery, consumer protection competition, taxation, and intellectual property rights.

While the Guidelines are not legally binding on companies, OECD and signatory governments are required to ensure that they are implemented and observed. What distinguishes the OECD Guidelines from some other corporate responsibility instruments and mechanisms is their transnational nature, the fact that they are government-backed

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[134] See generally http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx.

[135] See table at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=IV-4&chapter=4&lang=en.

[136] See table at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en.

[137] In the context of individual complaints against States, human rights treaty bodies already address many human rights violations involving business. See ESCR-Net, Global Economy, Global Rights: A Practitioner's Guide for Interpreting Human Rights Obligations in the Global Economy (2014). However, any resulting remedies are formally only against States, which may or may not implement them with regard to any businesses involved.

[138] The Guidelines are accessible at http://mneguidelines.oecd.org/text/.

standards and that they have a dispute resolution mechanism for resolving conflicts regarding alleged corporate misconduct.

Governments that adhere to the Guidelines must establish a National Contact Point ("NCP") to handle complaints against companies that have allegedly failed to adhere to Guidelines' standards.[139] The 'specific instance' procedure – as the Guidelines' complaint process is officially called – is meant to resolve disputes, primarily through mediation and conciliation, but also through other means. The dispute resolution procedure can be used by anyone who can demonstrate an "interest" (broadly defined) in the alleged violation.

Non-governmental organizations and trade unions from around the world have used the specific instance process to address adverse human rights impacts caused by alleged corporate misconduct. The OECD NCP system is one model of dispute resolution that could be expanded or used as a model for further consideration. It should be noted, however, that the effectiveness of NCP procedures varies among countries, and that some civil society actors have been sharply critical of NCP procedures as uneven and often ineffective.[140]

3. International Civil Adjudication.

There are no UN or other global courts where victims of human rights violations can sue States for declaratory judgments and reparations. However, at the regional level, there are at least three such institutions: the European Court of Human Rights, which can issue legally binding judgments in human rights cases against all forty-seven member States of the Council of Europe;[141] the Inter-American Court of Human Rights, which can issue legally binding judgments against the twenty OAS member States that accept its contentious jurisdiction;[142] and the African Court of Human and Peoples' Rights, which can issue legally binding judgments against the twenty-seven African States Parties to the Protocol establishing the Court.[143] (Human rights complaints can also be brought against States before some courts at the sub-regional level.)[144]

The jurisdiction of such international courts is generally considered subsidiary to that of national courts; cases may not be brought before the international courts until after remedies before national courts are exhausted or good reason is shown for not doing so.[145] The remedies they afford may vary. The Inter-American Court provides the widest range of reparations, including restitution where feasible; money damages for material and moral injuries; rehabilitation; satisfaction, including symbolic reparations such as naming of memorials and public apologies by high State officials; and guarantees of non-repetition, such as new laws and training programs for State officials and security forces.[146]

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[139] The NCP procedures are accessible at http://mneguidelines.oecd.org/ncps/.

[140] E.g., OECD Watch, Assessment of NCP Performance in the 2013-2014 Implementation Cycle, June 2014, accessible at http://oecdwatch.org/publications-en/Publication_3962.

[141] See Table at http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG, for Council of Europe treaty CETS No. 5.

[142] Int.Am.Ct.H.Rts., ANNUAL REPORT 2013, p. 5, accessible at http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2013.pdf.

[143] See Table at http://www.au.int/en/sites/default/files/achpr_1.pdf.

[144] E.g., Court of Justice of the European Union; see generally http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm; Community Court of Justice of the Economic Community of West African States (see note 145 below).

[145] The ECOWAS Community Court of Justice is an exception. Exhaustion of domestic remedies is not required before filing cases in that Court. Koraou v. Niger, Judgment ECW/CCJ/APP/0808, 27 Oct. 2008, pars. 36-53.

[146] See generally D. Cassel, The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights, in OUT OF THE ASHES: REPARATIONS FOR GROSS VIOLATIONS OF HUMAN RIGHTS, K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens eds. (Intersentia 2005), pp. 191-223.

To the extent States fail to carry out their duty to protect people from business, they may already be sued before regional human rights courts. However, not all States are parties to regional or sub-regional courts with competence to hear human rights cases. An international court on business and human rights might not only fill that gap, but could also permit suits against companies.

Where justice in the form of civil remedies is not available before the relevant national courts – which might be the courts of either the home State or the host State in the case of transnational corporations – an international court on business and human rights could thus, in theory, ensure the legal liability and access to civil justice which are among the demands of the civil society Joint Statement.[147] On the other hand, a significant number of States, including major home States of transnational corporations such as the US, UK and China, are likely to resist a treaty exposing their companies to suit for money damages in an international court, even if a treaty included procedural safeguards which would likely be prerequisites to creation of such a court.

Predominantly host countries of transnational investment might well agree to join a treaty creating such an international tribunal, and could confer jurisdiction on the tribunal, at least with respect to subsidiaries or other activities of transnational corporations operating in their territories. Whether they could confer jurisdiction on the parent companies of such subsidiaries, however, is a separate question.

A bevy of practical questions would be important for accessibility and efficacy of such an international tribunal. For example: What resources would it have? How would it be funded? How many cases could it hear? Could claims be aggregated? What remedies could it order? How would victims' litigation costs – let alone a semblance of equality of arms with wealthy corporate defendants – be assured?

The answers will not come easily. Yet if such issues are not tackled (whether in a treaty or in the statute or rules of the court), and victims seeking civil damages are left to the vagaries of national courts, justice may remain elusive. And even if workable answers are found, they still might not reach companies domiciled in States which decline to join the treaty.

4. International Mediation and Arbitration:

Thousands of bilateral and multilateral investment and trade treaties currently allow foreign corporations to sue host States, before international arbitral tribunals, for alleged breaches of stabilization clauses, regulatory takings, denials of justice, and other claims arising from State efforts to protect public health, the environment and worker rights in their territories.[148] Those same treaties do not, however, allow victims of any resulting human rights, consumer, worker or environmental violations to sue or countersue the foreign corporations before the arbitral tribunals for endangering their lives, health or livelihoods.

Recently a team of practitioners and scholars has circulated several drafts of a proposal to, in effect, redress this imbalance, by permitting victims of human rights violations in which companies are involved to bring the companies before an international arbitral tribunal on business and human rights.[149] Binding arbitration might be preceded by voluntary mediation. The arbitral tribunal might be created, and its use mandated or encouraged, by one or more of a variety of means, including voluntary agreements, incorporation into the Permanent Court of Arbitration,[150] conditions in supply chain contracts or in bank loans, and regulatory requirements.

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[147] See note 42 above.

[148] See generally Public Citizen, Case Studies: Investor-State Attacks on Public Interest Policies (2014), accessible at http://www.citizen.org/documents/egregious-investor-state-attacks-case-studies.pdf.

[149] Claes Cronstedt and Robert Thompson et al., An International Arbitration Tribunal on Business and Human Rights, Version 5, April 13, 2015, accessible at**Error! Hyperlink reference not valid.** http://www.l4bb.org/news/TribunalV5B.pdf. One of the authors of this White Paper has been a commentator on the drafts. Id., Appendix A at 21.

[150] See generally http://www.pca-cpa.org/showpage.asp?pag_id=363.

One means of establishing or utilizing the tribunal would be to provide for or recognize it in a treaty on business and human rights. A treaty might, for example, mandate States Parties to require businesses in certain circumstances to accept its jurisdiction. As opposed to lawsuits for damages before an international court, an arbitral proceeding might have the advantage of speedier and more streamlined procedures, and potential enforceability of its arbitral awards before the courts of nearly all nations under the New York Arbitration Convention.[151] If no international court is agreed to in a treaty, an arbitral tribunal, unlike individual complaint procedures before a treaty body, would have the advantage of being empowered to issue a legally binding award with potentially broad enforceability throughout the world. To the extent national justice systems remain beset by barriers to access and to fair adjudication, an arbitral tribunal might provide a workable alternative.

Many issues remain. For example: How would the tribunal be funded? How would victims' litigation costs be funded? In view of the controversial track record of investor-State arbitration in matters affecting human rights, would victims and their advocates be willing to use even a tribunal where they would have standing? How would arbitrators be found with the necessary expertise, credibility and objectivity in matters of business and human rights, particularly with respect to the specific concerns of communities and populations affected by corporate conduct? How public would be the arbitral proceedings and awards?[152]

Arbitration, as with transnational civil litigation, can also be lengthy and protracted. In some jurisdictions, citizens or claimants are never allowed to waive or relinquish their right to court in any type of contract signed before a dispute arises. Even if claimants may have a choice at the outset, a question remains of whether a consent to arbitrate will lead to a complete ban on future litigation.

The larger question is whether the model of investor-style international arbitration will be suitable to meet the needs of individual claimants or communities who seek redress for ongoing harms and need swift injunctive relief as opposed to damages and findings.

These and other questions are being addressed by the authors of the draft proposal through consultations with diverse stakeholders. While many of these questions might better be addressed in the rules of an arbitral tribunal, a drafting process for a treaty on business and human rights might take them into account.

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[151] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, entered into force, 7 June 1959, 330 U.N.T.S. 3. Some 152 States are parties to the Convention, including all major commercial States. See list at http://www.newyorkconvention.org/contracting-states/list-of-contracting-states, and update at http://www.newyorkconvention.org/.

[152] One widely used set of rules for international arbitrations are the Rules of UNCITRAL, the United Nations Commission on International Trade Law. Effective in 2014, UNCITRAL adopted Rules on Transparency in Treaty-Based Investor-State Arbitration. These new rules could also potentially be used or adapted for arbitrations on business and human rights. They presumptively provide that most written aspects of the proceedings will be made public. These include the notice of arbitration and response; statements of claim and defense; any further written statements or submissions by either party; expert reports and witness statements; a list of exhibits (but not necessarily the exhibits themselves); written submissions by third parties; transcripts of hearings where available; and any orders, decisions or awards by the tribunal. The Rules permit tribunals to accept third party submissions, and presumptively provide that evidentiary hearings and oral arguments shall be public. The new Rules are accessible at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html. See also United Nations Convention on Transparency in Treaty-Based Investor Arbitration, adopted 10 Dec. 2014, UNGA Res. 69/116, Annex, art. 2, not yet in force.

5. International Criminal Prosecution:

Corporate executives have been prosecuted by international courts since Nuremberg.[153] For example, two executives of the German company that sold gas to the Nazi gas chambers were prosecuted by a British military occupation tribunal, convicted and sentenced to death.[154] Japanese mining officials were also prosecuted by a British military occupation tribunal in the Far East.[155] Although corporations were not formally prosecuted at Nuremberg, their assets were seized and they were put out of business for violating international law.[156]

More recently the special international criminal tribunal for Lebanon has gone beyond merely prosecuting individuals, ruling that corporate defendants can be convicted for criminal contempt of court,[157] while a new Protocol to the African Court of Justice and Human and Peoples' Rights (discussed below), once it enters into force, authorizes criminal prosecutions of corporations for a range of international crimes.

Currently there are at least two models for international criminal prosecutions of gross violations of human rights involving business. One is the International Criminal Court ("ICC") in The Hague.[158] The ICC can prosecute only natural persons[159] – including business executives – for a limited range of crimes, namely genocide, war crimes and crimes against humanity.[160] In cases involving business and human rights, this model might be followed, either by adding a second chamber to the ICC, or by broadening the ICC's jurisdiction to include legal as well as natural persons,[161] or by creating a separate international criminal court specifically for crimes committed by business or in which business is complicit.

An alternative model has recently been provided by a 2014 Protocol, not yet in force, to the African Court of Justice and Human and Peoples' Rights.[162] The Protocol allows international criminal prosecution, not only of individuals, but also of corporations. A provision on "Corporate Criminal Liability" resolves several issues of attribution of crimes to corporations, as follows:

1. "… [T]he Court shall have jurisdiction over legal persons, with the exception of States."

2. "Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence."

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[153] See generally Matthew Lippmann, War Crimes Trials of German Industrialists …, 9 TEMPLE INT'L & COMP. L.J. 173 (1995).

[154] Id., text at notes 79-86.

[155] Anita Ramasastry, Corporate Complicity: From Nuremberg to Rangoon-An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations 91 Berkeley J. Int'l L. 20 (2002).

[156] See generally Amicus Brief of Nuremberg Scholars, in Kiobel v. Royal Dutch Petroleum, U.S. S. Ct. No. 10-1491, Dec. 21, 2011, accessible at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioner_amcu_nuremberg_bartov_etal.authcheckdam.pdf.

[157] Special Tribunal for Lebanon, Appeals Panel, Case No. STL-14-05/PT/AP/AR126.1, Case against New TV S.A.L. Karma Mohamed Tahsin al Khayat, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, 2 Oct. 2014, pars. 33-74.

[158] See generally Rome Statute of the International Criminal Court, 17 July 1998, entered into force, 1 July 2002, 2187 U.N.T.S. 3.

[159] Id., art. 25.1.

[160] Id., arts. 5, 6, 7 and 8.

[161] Article 25.1 of the ICC Statute currently provides, "The Court shall have jurisdiction over natural persons pursuant to this Statute." As a first step, Article 25.1 could be amended simply by adding the words "and legal" after the word "natural." The rest of the text would need to be reviewed to make any corresponding modifications. However, the process of amending the ICC Statute is difficult, requiring a high degree of consensus. See ICC Statute arts. 121-23.

[162] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, accessible at http://www.au.int/en/sites/default/files/PROTOCOL%20ON%20AMENDMENTS%20TO%20THE%20PROTOCOL%20ON%20THE%20AFRICAN%20COURT%20-%20EN_0.pdf.

3. "A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation."

4. "Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation."

5. "Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel."

6. "The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes."[163]

The Protocol grants the African Court jurisdiction over a broad range of crimes, including several which businesses might well commit. In addition to ICC crimes, the African Court will have jurisdiction over, among other crimes, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, and illicit exploitation of natural resources.[164]

A significant disadvantage of the African Protocol is that, unlike the ICC Statute which disallows official immunity,[165] the African Protocol grants immunity from prosecution before the African Court to "any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office."[166] Especially in cases where corporations or corporate executives may be accused of acting in complicity with "senior state officials," objections might be raised to prosecuting the accomplices, but not the principal perpetrators.

A treaty, of course, need not copy either the ICC or the African Protocol model wholesale. For example, the African Protocol could be used as a model for an international criminal tribunal on business and human rights, but without its provision immunizing senior state officials.

6. Comprehensive treaty:

The foregoing potential elements of a treaty on business and human rights are not mutually exclusive. A treaty could combine some or all of these elements, and others besides. The more elements are included, the more effective a treaty might be in ensuring business respect for human rights, and in providing remedies for any violations. On the other hand, the more ambitious the treaty content, the more difficult it may become to negotiate and to attract a wide range and large number of States to join the treaty, especially home States of major transnational corporations, and to appeal to the businesses which often significantly influence State positions. Where the fault lines may be, and where the trade-off's might be found, are matters that may best emerge from a process of dialogue and consultations. In addition to the inter-governmental process soon to begin at the UN, a global civil society process of consultation has also recently begun.[167]

C. Policy Coherence Treaties

1. National Laws:

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[163] Id. art. 22, adding art. 46C.
[164] Id. art. 28A.1.
[165] ICC Statute, art. 27.
[166] African Protocol, art. 22, adding art. 46A bis.
[167] FIDH and ESCR-Net New Joint "Treaty Initiative," Jan. 30, 2015, accessible at https://www.fidh.org/International-Federation-for-Human-Rights/globalisation-human-rights/business-and-human-rights/16868-fidh-and-escr-net-new-joint-treaty-initiative.

UN Guiding Principle 8 calls on States to ensure that their institutions that "shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, ..." Examples of State institutions cited by the Commentary include those responsible for "corporate law and securities regulation, investment, export credit and insurance, trade and labour." Others might include professional codes regulating the legal profession.[168]

It would be a tall order for a global treaty to attempt a comprehensive review and reform of national legislation and regulation in all of these areas. But agreement might be pursued in particular areas. For example, in regard to corporate law, to what extent ought parent companies to be responsible for the human rights impacts of their subsidiaries, including their subsidiaries abroad?[169] In regard to public procurement, States might pursue agreement on common human rights standards and due diligence processes.[170]

2. International Agreements:

UN Guiding Principle 9 provides that "States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts." The Commentary points out that the terms of "bilateral investment treaties, free-trade agreements or contracts for investment projects ... may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. ... States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection."

States might agree, for example, to include human rights protections in future investment and trade treaties.[171] They could also agree to treat them as terms of existing treaties, in cases where both States to a dispute are Parties to the new agreement, or otherwise agree to apply the new provisions in an existing treaty.[172]

D. Sectoral Treaties[173]

The foregoing sections catalogue, illustratively but not exhaustively, various ways that a treaty might address business with regard to human rights generally. It would also be possible to adopt a narrower treaty, focusing on a particular sector such as the extractives or information communications technology (ICT) sectors, or on the business role in regard to particular kinds of human rights abuses. Advantages of a narrower approach might include greater ease of adoption and ratification, because fewer technical legal issues might have to be resolved, and diplomatic consensus might be more readily reached. Disadvantages would include incompleteness of coverage, as well as

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[168] See section V.G. below.

[169] See Part V.E below.

[170] See, e.g., Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/29/28, 28 April 2015, pars. 40-42.

[171] See generally Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/29/28, 28 April 2015, pars. 18-28 (investment), 29-31 (international investment agreements and dispute settlement), 32-35 (transparency in international arbitration) and 36-39 (trade agreements and trade-related issues).

[172] For examples of new treaties adding terms to existing treaties, see, e.g., United Nations Convention on Transparency in Treaty-Based Investor Arbitration, adopted 10 Dec. 2014, UNGA Res. 69/116, Annex, art. 2, not yet in force; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, entered into force, 26 June 1987, 1465 U.N.T.S. 85, art. 8 (Torture offenses "shall be deemed to be included as extraditable offenses in any extradition treaty existing between States Parties.")

[173] The Human Rights Council Resolution establishes the Intergovernmental Working Group on "a" legally binding instrument, for the purpose of elaborating "an" international legally binding instrument. UN HRC Res. 26/9, 26 June 2014, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, par. 1. Hence it appears that further HRC authority might be needed for the Working Group to elaborate more than one treaty.

potentially burdensome selectivity in regard to a particular industry. This, in turn, could adversely affect the interests of some States more than others.

V. SELECTED KEY ISSUES.

In deciding among and fleshing out treaty options, a number of cross-cutting issues will need to be considered. The following issues are not a comprehensive list, but are among the most prominent and contentious. They include:

- What companies are to be regulated – transnational corporations, large corporations, or all corporations? What will be the responsibility of State-owned enterprises?

- What human rights norms will the treaty enforce against business – jus cogens, customary international law, human rights treaties in States that are parties to those treaties, or the norms specified by the UN Guiding Principles (the International Bill of Human Rights, the ILO Declaration of Fundamental Labor Rights, plus others in context)?

- What substantive norms will the treaty impose for civil damages claims – international human rights law or domestic tort/delict standards? Will the treaty defer to international, regional or national legal standards for concepts such as complicity, or refer instead to general principles of law?

- Extraterritorial jurisdiction: Will States be expressly authorized or required to exercise jurisdiction over human rights violations committed outside their territories by companies domiciled in the State?

- What is the scope of corporate responsibility: In what circumstances will parent companies be liable for wrongs committed by subsidiaries, and vice versa?

- Duty bearers: Will the treaty impose direct obligations only on States, or will it impose direct obligations on business as well?

- Lawyers and business advisors: Will the treaty ensure policy coherence between their human rights responsibilities and their professional codes of conduct and ethics?

The following sections address these topics in sequence:

A. What companies are to be regulated – transnational corporations, large corporations, or all corporations?

The recurrent heading of UN Human Rights Council resolutions on business and human rights has been "transnational corporations and other business enterprises." (Emphasis added.) The Guiding Principles explicitly apply to "all" business enterprises:

> "The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts."[174]

Yet as noted above, even though the Council's June 2014 resolution initiating the treaty process repeats the phrase, "transnational corporations and other business enterprises," a footnote in the preamble defines "other business enterprises" to include only those which have a "transnational character in their operational activities." The footnote expressly excludes "local businesses registered in terms of relevant domestic law."[175]

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[174] UN Guiding Principle 14

[175] UN HRC Res. 26/9, 26 June 2014, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, par. 9. UN HRC Res. 26/9.

This ambivalent narrowing of scope – from all business enterprises to only transnational corporations -- has been widely criticized, by both States and civil society, as disfiguring the business and human rights agenda. Ruggie's critique is illustrative:

> "A footnote defines 'other business enterprises' in a way that is intended to exclude national companies. Thus … the proposed treaty would have covered international brands purchasing garments from the factories … in the collapsed Rana Plaza building in Bangladesh, but not the local factory owners … employing the more than 1,100 workers who died …."

> "The core sponsors of the resolution may have found this formulation to be useful in putting together their voting coalition. But it poses two enormous impediments to future progress. First, an exclusive focus on transnational corporations has always triggered strong opposition from their home countries, … as well as from international business. … [I]t has also dampened the enthusiasm of civil society organizations for the initiative. … because for victims the corporate form of the abuser is irrelevant."

> "Second, the definition of 'other business enterprises' … makes no sense either in logical or legal terms. … [T]here is no meaningful distinction between 'transnational corporations' and 'enterprises that have a transnational character.' … More importantly, transnational corporations' subsidiaries are typically required to incorporate under 'relevant domestic law,' often in joint ventures, including with state-owned enterprises or … local businesses. … How do all these structures and relationships get disentangled? …"[176]

Given the breadth of opposition to excluding national corporations from the treaty, this issue is likely to be raised during the negotiations. (This is a distinct issue from whether specific types of companies (e.g., Small and Medium Enterprises ("SME's"), or State owned enterprises) would be exempt from specific treaty requirements, or might be given a different timeline or scope of compliance with obligations.)

B. What human rights norms will the treaty enforce against business – jus cogens, customary international law, human rights treaties in States Parties to those treaties, or the norms specified by the UN Guiding Principles (the International Bill of Human Rights, the ILO Declaration of Fundamental Labor Rights, plus others in context)?

The range of human rights covered by the treaty may depend on the kinds of duties imposed by the treaty, or even by particular provisions of the treaty. To the extent the treaty focuses on reporting, planning, or implementing the Guiding Principles, it should cover a broad range of rights. As John Ruggie concluded after analyzing more than 300 reports of alleged corporate abuses, "there are few if any internationally recognized rights business cannot impact - or be perceived to impact - in some manner. Therefore, companies should consider all such rights."[177] Hence the Commentary to Guiding Principle 12 enjoins:

> "Because business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights. In practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention. However, situations may change, so all human rights should be the subject of periodic review."

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26 June 2014, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, note one.

[176] John Ruggie, Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors, Sept. 9, 2014, Institute for Human Rights and Business, accessible at http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html.

[177] John Ruggie, Protect, Respect and Remedy: a Framework for Business and Human Rights, UN Doc. A/HRC/8/5, 7 April 2008, par. 52.

Guiding Principle 12 recognizes the business responsibility to respect, at minimum, all rights articulated in the International Bill of Human Rights and the ILO Declaration of Fundamental Principles and Rights at Work.[178] The International Bill of Human Rights includes the 1948 Universal Declaration of Human Rights,[179] the 1966 International Covenant on Civil and Political Rights,[180] and the 1966 International Covenant on Economic, Social and Cultural Rights.[181] Together these three instruments cover a broad range of rights. The ILO Declaration addresses specific workplace rights: freedom of association, prohibitions on child labor and forced labor, and non-discrimination.

These constitute the minimum catalogue of rights for purposes of human rights due diligence. In addition, the Commentary to Guiding Principle 12 explains:

> "Depending on circumstances, business enterprises may need to consider additional standards. For instance, … [UN] instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. Moreover, in situations of armed conflict enterprises should respect the standards of international humanitarian law."

For treaties focused on reporting, planning, or implementation of the Guiding Principles, then, the coverage of rights should be very broad. On the other hand, to the extent a treaty establishes an individual complaint procedure, or provides for civil damages remedies, the list of human rights that can be invoked through such procedures might be narrowed to the kinds of rights – still a broad list – reasonably "justiciable" in similar proceedings against States.[182] Such an adjustment would have to be undertaken with care, because even rights that might appear less compelling in other contexts (e.g., the right to leisure) can be serious in a business context where workers can be subjected to long hours with little or no rest.

Finally, to the extent a treaty imposes criminal sanctions, it would apply, not to all human rights violations, but only to violations caused by the commission of an existing international crime,[183] or conceivably by a new international crime recognized and defined by the treaty, or by a national crime that affects human rights.[184] If criminal prosecution were the only approach adopted, it would exclude most human rights infringements by business.

A single treaty could of course employ different menus of rights: a full range for planning provisions, a somewhat narrower range for civil complaints, and a much narrower range for criminal prosecutions.

C. What substantive norms will the treaty impose for civil damages claims – international human rights law, or common law tort standards or, in civil law countries, the civil law equivalent? Will the treaty defer to national legal standards for concepts such as complicity or refer to general principles of international law?

A number of suits for money damages have been brought in English courts against British companies for human rights violations committed in other countries based, not on international human rights law, but on common law

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[178] The Declaration, together with an explanatory report, is accessible at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_176149.pdf.

[179] 10 December 1948, accessible at http://www.un.org/en/documents/udhr/.

[180] Adopted, 16 December 1966, entered into force, 23 March 1976, 993 U.N.T.S. 171.

[181] Adopted, 16 December 1966, entered into force, 3 Jan. 1976, 993 U.N.T.S. 3.

[182] See sections IV.A.7, IV.B.2, and IV.B.3 above.

[183] See section IV.B.5 above.

[184] The Statutes of some international criminal tribunals allow for the prosecution of certain national as well as international crimes. E.g., the Statute of the Special Tribunal for Lebanon, art. 2.1 (a), grants the Tribunal jurisdiction over "[t]he provisions of the Lebanese Criminal Code relating to … terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, …" (Accessible at http://www.stl-tsl.org/en/documents/un-documents/un-security-council-resolutions/security-council-resolution-1757.) Likewise Article 5 of the Statute of the Special Court for Sierra Leone granted the Court jurisdiction over "crimes under Sierra Leonean law," including abuse or abduction of girl children and arson. (Accessible at http://www.rscsl.org/Documents/scsl-statute.pdf.)

tort theories such as trespass and negligence. Several settlements have resulted.[185] Following the decision of the US Supreme Court in 2013 in Kiobel v. Royal Dutch Petroleum,[186] which narrowed jurisdiction over human rights suits under the federal Alien Tort Statute, suggestions have been made to seek damages for overseas human rights violations by filing common law tort suits in US state courts.[187] Plaintiffs are now bringing common law tort claims in Canada with respect to the conduct of extractive companies overseas.[188]

It has been argued that, if a civil damages remedy in national courts is permitted or required by a treaty, it could be more effective in practice, at least in common law countries, if it were based on reasonably well-understood common law torts, with which common law judges are already familiar and comfortable, than on novel definitions of damages actions based directly on international human rights law.[189] In effect it is argued that, since common law tort actions have succeeded in practice, Why argue with success?

On the other hand, even where they result in payment of money damages, common law tort actions may not do justice to the gravity of the invasion of human dignity occasioned by gross violations of human rights. They may also be frustrated by procedural obstacles under national laws, such as short statutes of limitations, that should not apply to treaty-based actions for serious human rights violations.[190] In addition, civil remedies for violations of human rights may also be more congruent than common law torts with a comprehensive treaty enforcing international human rights law, and more uniform among potential States Parties with varying legal traditions (e.g., common law, civil law, Islamic law). And even with tort law as a basis for redress, the legal standards for what gives rise to liability (e.g., claims of negligence, intentional torts, standards for accomplice liability, etc., may vary somewhat from jurisdiction to jurisdiction.)

This is an issue treaty drafters may wish to consider. One potential solution might be for a treaty to contemplate both kinds of remedies – human rights suits and national tort suits (or other national damages remedies) – as vehicles to secure civil justice for victims of business violations of human rights.[191]

D. Extraterritorial jurisdiction: Will States be expressly authorized or required to exercise jurisdiction over human rights violations committed outside their territories by companies domiciled in the State?

Where a host State is unwilling or unable to provide victims access to effective remedies for human rights violations by a foreign company operating in its territory, should the treaty require the company's home State to exercise jurisdiction? If the answer is "no," then victims may continue to be deprived of effective remedies. Even if an international tribunal on business and human rights were to be established, history teaches that most international courts

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[185] See generally Richard Meeran, Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States, 3 CITY UNIV. HONG KONG L. REV. 1 (2011).

[186] 133 S. Ct. 1659 (2013).

[187] E.g., Roger Alford, The Future of Human Rights Litigation after Kiobel, 89 *NOTRE DAME L. REV.* 1749 (2014).

[188] Susana C. Mijares Peña, Human Rights Violations by Canadian Companies Abroad: Choc v Hudbay Minerals Inc., 5 UWO J LEG STUD 3 (2014), accessible at <http://ir.lib.uwo.ca/uwojls/vol5/iss1/3>.

[189] See Meeran, note 185 above, at 24 ("This approach of invoking tort law involves allegations of negligence rather than human rights violations, which could be regarded as diminishing the significance of the harm, but on the other hand has the advantages of simplicity and being potentially applicable to fundamental human rights violations as well as violations of socio-economic rights ... ")

[190] E.g., Int.Am Ct.H.Rts., Barrios Altos v. Peru, Judgment of March 14, 2001, Series C, No. 75, par. 41 ("provisions on prescription," i.e., statutes of limitations); Basic Principles on the Right to a Remedy and Reparation .... UNGA Res. 60/147, UN Doc. A/RES/60/147, 21 March 2006, Annex, pars. 6 and 7 (re statutes of limitations).

[191] For a discussion of the varying ways States have incorporated the right of victims to seek a remedy for human rights abuses committed by natural persons, see Beth Stephens, Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations, 27 YALE J. INT'L L. 1 (2002). Accessible at SSRN: http://ssrn.com/abstract=2125469

have limited resources and can hear only a relatively limited number of cases.[192] National justice cannot be abandoned altogether.

Guiding Principle 2 does not quite answer the question of a home State's extraterritorial jurisdiction: It provides that "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations." But must States embody this extraterritorial "expectation" in law and practice?

The Commentary is more specific, taking the view that extraterritorial jurisdiction is permissive, but not mandatory:

> "At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis."

The Commentary to Guiding Principle 2 does recognize that "some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction." Increasingly, however, the International Court of Justice,[193] global and regional human rights treaty bodies, and UN thematic experts interpret human rights treaties not merely to permit, but to impose extraterritorial obligations, including with regard to regulation of business activities abroad.[194]

There is no doubt that States have the right to exercise extraterritorial jurisdiction over their own companies. In the United States Supreme Court litigation in the Kiobel case, the United Kingdom and Dutch governments—which as amici curiae opposed the exercise of US extraterritorial Alien Tort Statute ("ATS") jurisdiction over UK and Dutch companies[195]—nonetheless agreed that "active personality jurisdiction," by which the United States could apply the ATS extraterritorially to Americans, "is very clearly asserted (and accepted) in State practice, and is well established in international law."[196] Calling the same principle by a different name, the European Commission termed the "nationality principle" an "uncontroversial basis for jurisdiction under international law."[197]

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[192] An arguable exception is the European Court of Human Rights, which has 47 full-time judges and an annual budget of nearly $90 million. To the extent the UN, or the States Parties to a treaty, were willing to provide that level of human and financial resources, an international court on business and human rights could take on more of the burden of justice. (The European Court's 2013 budget of 66.8 million euros is accessible at http://www.echr.coe.int/Pages/home.aspx?p=court/howitworks&c=#newComponent_1346157778000_pointer. At the June 24, 2013 exchange rate of one euro = $1.31, that amounted to $86.7 million.)

[193] ICJ, *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep., p. 136*, par. 109.

[194] See generally ESCR-Net, Global Economy, Global Rights: A Practitioner's Guide for Interpreting Human Rights Obligations in the Global Economy (2014).

195 See Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party at 5–6, 18–23, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491).

196 Id. at 14. For example, Canadian courts have presumptive jurisdiction over foreign torts where the defendant is "domiciled or resident" in Canada. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, paras. 81–82, 85–86, 90(a) (Can.).

197 European Commission Amicus Brief in Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491), at 11. EU law, governing the twenty-eight EU member States, Countries, EUROPA, http://europa.eu/about-eu/countries/index_en.htm (last visited Feb. 12, 2014), and other European States who join the regulations voluntarily, makes jurisdiction turn mainly on domicile. The EU default rule is that "persons domiciled" in an EU State "shall, whatever their nationality, be sued in the courts of" the domiciliary State. Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, arts. 2.1, 3.1, 2001 O.J. (L 12) 1, 3–4 (EC); Council Decision 2007/712/EC of 15 October 2007 on the Signing, on Behalf of the Community, of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and

Granted, any exercise of extraterritorial jurisdiction by a home State must be "reasonable" – paying due regard to the jurisdictional claims and sovereignty of the host State – but it is well-accepted under international law that, in principle, home States may adjudicate suits against their own companies (as opposed to foreign companies) for human rights violations committed outside their territories.[198]

International law, then, plainly allows States to engage in reasonable exercises of jurisdiction over the conduct of their corporations in other States. A treaty on business and human rights, or a protocol thereto, could either explicitly authorize or require States to exercise such extraterritorial jurisdiction. The treaty or protocol could undertake to articulate guidelines on the parameters of "reasonableness," or instead allow courts or legislatures to decide on the reasonableness of particular exercises of extraterritorial jurisdiction, in light of general principles of international law governing jurisdiction.[199]

E. What is the scope of corporate responsibility – Will parent companies be liable for the wrongs of subsidiaries, and vice versa?

In what circumstances should a treaty hold parent companies responsible for the actions of their subsidiaries or other corporate entities, and vice versa? The answer may depend on the kinds of duties the treaty imposes. To the extent a treaty mandates reporting, planning and prevention, including implementation of the Guiding Principles, it might not be controversial or impracticable to require parent companies to make sure that their subsidiaries (and other corporate entities, especially controlled entities) meet these responsibilities.

This seems to be the approach of the Guiding Principles. They generally refer to the responsibilities, not of a particular "corporation" or "company," but of a "business enterprise." The term "enterprise" is not defined. However, the language and logic of the Principles suggest that it embraces both a parent company and its subsidiaries. For example, the Commentary to Guiding Principle 2 cites, as an example of domestic measures with extraterritorial implications, "requirements on 'parent' companies to report on the global operations of the entire enterprise." This would make no sense unless the concept of "enterprise" included both parent companies and their subsidiaries.

The issue becomes more complicated to the extent a treaty mandates civil damages remedies against corporations. Most States have adopted, in one form or another, the separate entity doctrine. When one corporation invests in another – even when the first company owns 100% of the shares of the second, as in the case of parent companies with wholly owned subsidiaries – the two corporations are still treated as separate entities for purposes of legal liability. National laws typically provide, then, that the parent cannot be held legally liable for wrongs committed by the subsidiary (i.e., the "corporate veil" cannot be pierced), unless the subsidiary is shown to be a mere façade or was created solely in order to defraud creditors.[200]

Recent developments in common law cases indicate that, in some limited circumstances, a parent company can be held to have a "duty of care" to the employees of a subsidiary, or to persons injured by a subsidiary, the breach of

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Commercial Matters, arts. 2, 3.1, 2007 O.J. (L 339) 3. In tort cases they may also be sued in the State where the "harmful event" takes place. Brussels I Regulation, art. 5.3; Lugano II Convention, art. 5.3.

[198] See generally D. Cassel, Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open, 89 NOTRE DAME L. REV. 1773, 1778-79 (2014).

[199] See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987). Compare § 402 (jurisdiction to prescribe) and § 421 (jurisdiction to adjudicate), with § 431(1) (jurisdiction to enforce judicially). All three categories authorize states to exercise jurisdiction over acts abroad by their own nationals, §§ 402(2), 421(2)(d)–(e), and 431(1), subject to the limit that the exercise be reasonable. Id. §§ 403, 421(1)–(2), and 431(1)–(2).

[200] See, e.g., Presbyterian Church of Sudan et al. v. Talisman Energy Inc., 453 F. Supp. 2d 633 (S.D.N.Y. 2006), affirmed, 582 F. 3d 244 (2d Cir. 1999); see generally G. Skinner, R. McCorquodale and O. De Schutter, The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business (2013), pp. 59-64.

which can result in legal liability.[201] In such cases the parent is held liable, not for the misconduct of its subsidiary, but rather for its own misconduct in breaching its duty of care. Negotiators might consider incorporating such a doctrine into a treaty.

Negotiators might also consider a broader parental company duty of care in regard to human rights. Without abrogating the general application of the doctrine of separate entity, negotiators might consider the following recommendation made by three distinguished scholars, in the particular context of a parent company's human rights due diligence:

> "[T]he duty of the parent company to exercise due diligence by controlling the subsidiary to ensure it does not engage in human rights violations, directly or indirectly, should be clearly affirmed. This should be seen as part of the due diligence necessary to meet the corporate responsibility to respect human rights, as set out in the UNGPs. The concept … amounts to imposing on the parent company a duty to monitor the activities of its subsidiaries, … This also includes the responsibility that all businesses seek to prevent and mitigate, through use of their leverage, all human rights violations by those with whom they have a business relationship. In contrast to the limited liability approach, this incentivizes the parent company to ensure that its subsidiaries and business partners comply with human rights."[202]

This scholarly recommendation is consistent, not only with the "enterprise" approach of the UN Guiding Principles to due diligence, but also with the even more explicit "enterprise" approach of the OECD Guidelines for Multinational Enterprises. In calling on business to respect human rights and to carry out due diligence,[203] the OECD Guidelines "extend to enterprise groups, although boards of subsidiary enterprises might have obligations under the law of their jurisdiction of incorporation. Compliance and control systems should extend where possible to these subsidiaries. Furthermore, the board's monitoring of governance includes continuous review of internal structures to ensure clear lines of management accountability throughout the group."[204]

F. Duty bearers: Will the treaty impose direct obligations only on States, or will it impose direct obligations on business as well?

During the drafting process of the UN Guiding Principles, reports John Ruggie, governments North and South "had deep seated doctrinal concerns about making corporations subjects of international human rights law."[205] The US statement of objections to the June 2014 UN Human Rights Council treaty resolution included an assertion that business corporations are not "subjects" of international law.[206]

There are competing schools of thought among eminent scholars on whether corporations are subjects of international law.[207] Positivists insist that corporations are not subjects of international law, because no international instrument expressly recognizes them as such.[208] More flexible interpreters suggest that corporations may at least have "limited international legal personality."[209] Finally, pragmatists argue that the issue of whether corporations are

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[201] Compare England and Wales Court of Appeal, Chandler v. Cape PLC, [2012] EWCA Civ 525 (25 April 2012), par. 80, and Superior Court of Justice of Ontario, Choe v. HudBay Mincrals, Inc., 2013 ONSC 1414, Decision of 22 July 2013, pars. 74-75, with District Court of The Hague, Akpan v. Royal Dutch Shell PLC, Case No. C/09/337050/HA ZA 09-1580, Judgment, 30 Jan. 2013 (2013), pars. 3.31, 3.32.

[202] G. Skinner, R. McCorquodale and O. De Schutter, The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business (2013), p. 68.

[203] OECD Guidelines (2011), pars. II.2, II.10, and Chapter IV.

[204] OECD Guidelines (2011), Commentary on General Policies, par. 9.

[205] John Ruggie, Response to RAID "Executive Summary", 23 March 2015, p. 1, accessible at http://business-humanrights.org/sites/default/files/documents/Ruggie%20response%20to%20RAID.pdf.

[206] Note 45 above.

[207] See generally Jose Alvarez, Are Corporations "Subjects" of International Law?, 9 SANTA CLARA J. INT'L. LAW 1 (2011).

[208] See Decl. of James Crawford S.C., Presbyterian Church of Sudan v. Talisman Energy Inc., Republic of Sudan, 453 F. Supp. 2d 633 (S.D.N.Y. 2006).

[209] Andrew Clapham, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 79 (2006).

"subjects" of international law is irrelevant to the question of what legal responsibilities can be imposed on corporations: "Skepticism about the 'personhood' of corporations should not be confused with doubts about whether international corporations have responsibilities (as well as rights) under international law. Clearly they now have both."[210]

At present, thousands of bilateral and multilateral investment and trade agreements grant corporations both substantive rights (e.g., regulatory stability, compensation for property takings, and due process of law) and remedial rights to sue States before international arbitration panels.[211] Under the European Convention on Human Rights, corporations are also permitted to make claims against States for property takings and denials of due process of law before the European Court of Human Rights.[212] EU treaties also permit corporations to bring cases before the European Court of Justice, if their rights have been infringed by an EU institution.[213]

Whatever one's view on whether corporations are "subjects" or "legal persons" under international law, if international treaties can grant corporations rights and remedies, as in these instances, it is difficult to discern why a treaty cannot also impose human rights duties on corporations, enforceable before national or international courts. Whether a treaty on business and human rights should impose duties directly on companies would appear to be a policy choice to be made by the negotiators, one way or the other, and not a decision determined by current international law.

G. What is the Role of Lawyers and other Business Advisors?

The legal profession has been among civil society actors promoting implementation of the Guiding Principles. The American Bar Association ("ABA) has endorsed the Guiding Principles.[214] The Business and Human Rights Advisory Group of the Law Society has recommended, among other measures, that the Law Society take the position that its law firm members have a responsibility to respect human rights, and that they should develop policies and procedures to implement that responsibility.[215] The International Bar Association has published pilot guidance for bar associations and business lawyers.[216]

Law firms and other business advisors, such as consulting and risk management firms, have at least a dual responsibility with regard to human rights: both as businesses themselves, and as advisors to their business clients.[217] While the ethical rules of the ABA, at least, "may well" affirmatively support these human rights responsibilities,[218] a

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[210] Alvarez, note 207 above, at 31 (footnote omitted).

[211] See generally Public Citizen, Case Studies: Investor-State Attacks on Public Interest Policies (2014), accessible at http://www.citizen.org/documents/egregious-investor-state-attacks-case-studies.pdf.

[212] See generally, e.g., W. van den Muijsenbergh and S. Rezai, Corporations and the European Convention on Human Rights (2012), accessible at http://www.mcgeorge.edu/Documents/Conferences/GlobeJune2012_Corporationsandthe.pdf.

[213] http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm

[214] The ABA resolution and accompanying report are accessible at www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2014_hod_annual_meeting_109.authcheckdam.pdf.

[215] Law Society, Business and Human Rights Advisory Group Recommendations, Jan. 2014, p. 13, Recs. 1 and 6. See also the Council of Bars and Law Societies, Corporate Responsibility and the Role of the Legal Profession, accessible at www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_07022013_CSR_and_1_ 1361955115.pdf

[216] Int'l Bar Association ("IBA"), Business and Human Rights Guidance for Bar Associations, and its Annex, Guidance for Business Lawyers on the UN Guiding Principles on Business and Human Rights (2014).

[217] IBA, Guidance for Business Lawyers, note 216 above, pp. 16-18.

[218] "ABA Model Rule of Professional Conduct 2.1 may well apply in this context. It requires lawyers to exercise 'independent professional judgment and render candid advice' and permits them to 'refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.' … This imperative logically would include applicable international standards in the conduct of a client's affairs, including the Framework and Guiding Principles where corporate clients are concerned."

". ABA report, note 214 above, at 5 n. 16 (citation omitted).

treaty might commit States to ensure policy coherence between the human rights responsibilities of lawyers, law firms and other business advisors, and their duties under professional codes of conduct and ethics promulgated by bar associations and State entities.

CONCLUSION

This Paper seeks, not to advocate, but to inform. It takes no position on the advisability of a treaty on business and human rights, or on the form and content of any such treaty. It is offered in the belief that an informed negotiating process deserves, at the outset, a basic knowledge of the background that brought negotiators to the table, and an awareness of the main options, issues and choices that lie before them. It is in that spirit that this Paper has been prepared.

This Paper also provides analysis of the current policy landscape and context as the treaty process begins. This landscape, however, is constantly shifting, as States, civil society and businesses engage in further actions in relation to business and human rights.